

15 J. g.

THE
Accomplish'd Practiser
IN THE
High Court of Chancery.

S H E W I N G

The whole Method of Proceedings, according to the present Practice, from the Bill to the Appeal, inclusive.

C O N T A I N I N G

The Original Power and Jurisdiction of the Chancery, both as a Court of Law and Equity; the Office of the Lord Chancellor, Master of the Rolls, and the rest of the Officers :

A L S O

The best Forms and Precedents of Bills, Answers, Pleas, Demurrers, Writs, Commissions, Interrogatories, Affidavits, Petitions, and Orders :

T O G E T H E R W I T H

A LIST of the OFFICERS and their Fees :

L I K E W I S E

Other MATTERS useful for PRACTISERS.

By JOSEPH HARRISON of Lincoln's Inn, Esq.

The SEVENTH EDITION, (being a new one) upon a Plan different from that pursued in the former Editions of this Work; with all the Practice enlarged under every Head, and an addition of Precedents of all kinds; the Proceedings upon a Commission of Lunacy; with additional Notes and References to the Ancient and Modern Reports in Equity.

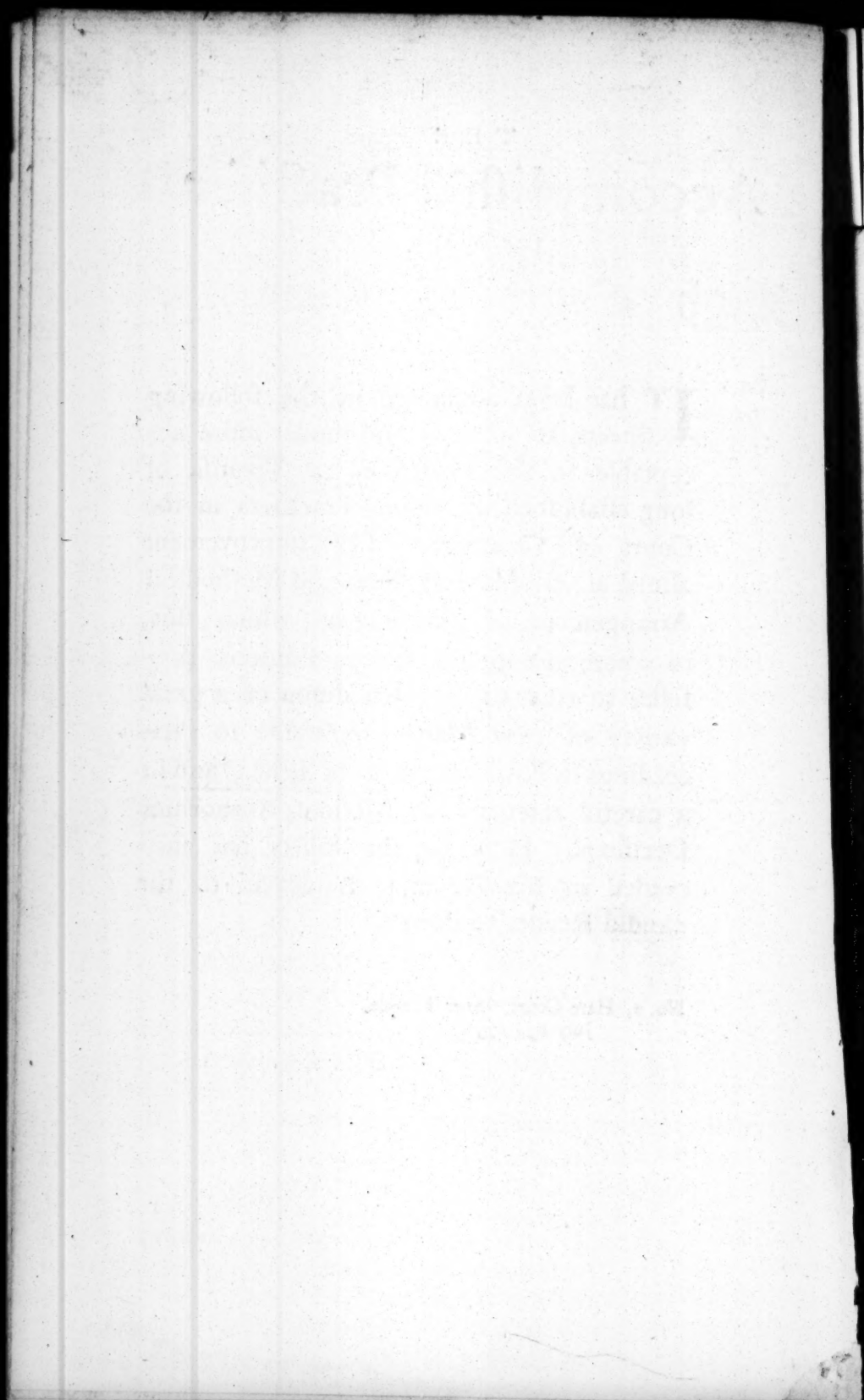
By JOHN GRIFFITH WILLIAMS, Esq.
Of Lincoln's Inn, Barrister at Law.

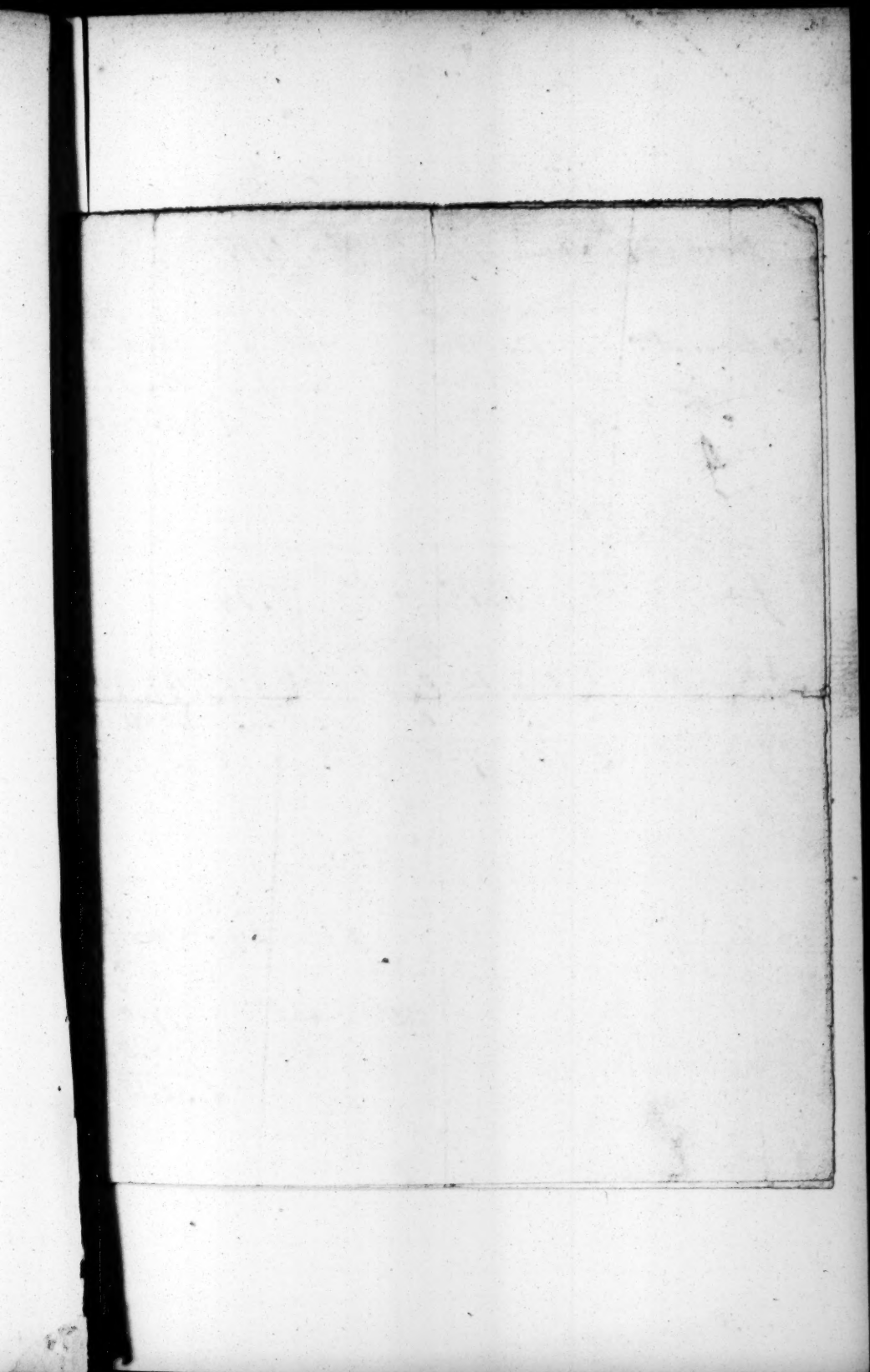
I N T W O V O L U M E S.
V O L. I.

L O N D O N :

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IN INNER TEMPLE LANE.

1790.





from 29th Jan^y 1776 to D^o 1777

50 Provent ^{ts}	£ 125. 18. 0	writing	£ 12. 10. 0
	25. 0. 0	land tax	12. 10. 0
	<u>£ 100. 18. 0</u>		<u>£ 25. 0. 0</u>

from 29th Jan^y 1778 to D^o 1779.

53 Provent ^{ts}	£ 127. 12. 0	writing	£ 13. 5. 0
	25. 15. 0	land tax	12. 10. 0
	<u>£ 101. 17. 0</u>		<u>£ 25. 15. 0</u>

from 29th Jan^y 1780

31 Provent ^{ts}	£ 77. 0. 0
	20. 5. 0
	<u>£ 56. 15. 0</u>

from 29th Jan^r 1777 to D^c 1778

	£	s	d		£	s	d
62 Provent ^{rs}	159	10	0	writing	15	10	0
	28	0	0	land tax	12	10	0
	£	131	10	0	£	28	0

from 29th Jan^r 1779 to D^c 1780

	£	s	d		£	s	d
36 Provent ^{rs}	92	3	0	writing	9	0	0
	21	10	0	land tax	12	10	0
	£	70	13	0	£	21	10

Jan^r 1780 to D^c 1781

	£	s	d
writing	7	15	0
land tax	12	10	0
	£	20	5

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IT has been attempted in the following Sheets, to improve and render more acceptable to the Profession, a Treatise of long established use among Practisers in the Court of Chancery. The improvement aimed at, consists in a New and Methodical Arrangement of the Subject which this, in common with the former Editions, professes to treat of, in the addition of a great variety of new Matter applicable to Proceedings in Equity in all its branches, and in a careful reference to Modern Authorities Decisions. How far the Editor has succeeded in his Attempt, he leaves to the candid Reader to decide.

No. 2, Hare Court, Inner Temple,
July 29, 1790.

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Since the present Edition was sent to the Press, it has been determined by the Court of Common Pleas, that an action on the case on stat. 23 Hen. 6. c. 9. will not lie against a Sheriff for refusing to take bail on an attachment out of Chancery; that statute referring only to process in courts of common law.—Studd v. Acton, Trin. 30 Geo. 3. H. Black. Rep. 468.



OF THE

Court of Chancery.

INTRODUCTION.

A COURT is a place where justice is judicially administered, and it is called *Curia*, saith *Valla*, a *Curia*; for that care is to be taken therein, for the deciding of controversies: But it seemeth rather to be called *Curia*, an Assembly, or the Place of an Assembly, like as the King's Court was first called *Curia*, because the Court of Justice was there first holden.

It is the opinion of several learned authors (as Mr. *Cambden* in his *Britannia* and Doctor *Coxwell* in his *Interpreter* have observed) that the Chancery had its name originally from certain bars laid one over another cross-wise like a lattice, wherewith it was environed, to keep off the press of the people, and not to hinder the view of those officers who sat therein; such grates or cross bars being by the *Latini* called *Cancelli*.

Vid. Dugd.
32. Cambden, Cowell,
Cassiod. Ep.
6. lib. 11.
Pet. Pythæus, lib. 2.
advers. c. 12.

And that the Chancellor's office originally was to register the acts and decrees of the Judges; *qui conscribendis et excipendis Judicum actis dant operam*, saith *Lupanus*.—*Pythæus* also expressing that he was anciently called *Secretarius*.

Ibid.

Howbeit, not only in this, but in other kingdoms this office hath been for many ages so much advanced, that the person who held it hath been the chief for the administration of justice, especially in private causes, next under the Prince.

Dugd. 30.

Of the Court of Chancery.

Ibid.

As for the antiquity of this Court, in this realm, it is no less, as our learned *Selden* conceives, than King *Ethelbert's* time, who was the first Christian King of the Saxons; for in a charter of his, to the Church of *Canterbury*, bearing date in the year of *Christ* 605, amongst other witnesses thereto, there is *Augemandus Referendarius* mentioned, where *Referendarius*, saith he, may well stand for *Cancellarius*; and that the office of both, as the words applied to the Court are used in the Code, Novels, and story of the declining Empire, signified an officer who received petitions and supplications to the King, and made out his writs and mandates, as a *Custos Legis*: and though (saith the same learned author) there were divers *Referendarii*, as sometimes thirteen, then eight, then more again, and so divers Chancellors in the empire; yet one especially, here, exercising an office of the nature of those many, might well be styled by either of those names.

Ibid. 32, 33,
34.

Certain it is that both the *British* and *Saxon* Kings had their Chancellors, and Court of Chancery: *Wilfrid* was Chancellor to *Athelstan*, *Adulph* to King *Edgar*, *Thurkittle* to King *Edred*—and of *Thurkittle*, *Ingulphus* hath this expression, viz. *Cancellarium suum constituit, ut quæcunque negotia temporalia vel spiritualia Regis judicium expectabant, illius consilio et decreto (tam sanctæ fidei et tam profundi ingenii tenebatur, omnia tractarentur) et tractata irrefragabilem sententiam sortirentur.*

*Selden Off.
of Chanc.
sec. 1.
Dugd. 32.
and the au-
thorities
there cited.*

From this passage it is manifest what the peculiar province and business of the Chancellor was in those early times, and from that and many other passages to be met with in ancient authors we are well warranted in presuming that his office was of the highest importance in the State—that he was the counsellor and faithful adviser of the King upon all occasions of difficulty, and which required wise and prudent decision—that to him, as to the guardian and protector of the laws and constitution, was committed the administration of affairs spiritual as well as temporal; this confidence, so honourable to himself and important to his sovereign and the public, being placed in him out of regard to the lustre of his virtues and the superior extent of his knowledge of the laws and learning of the times.

4 Inst. 78.

My Lord *Coke*, in further proof that the Court of Chancery was long antecedent to the reign of King *Athelstan* and his immediate successors, cites a passage out of the *Mirror*: “*Le premier Constitutions ordenus per les viels Roys, &c. ordain fuit que chescun eyt del Chancery le Roy brief remedial a son plenit sans difficultis.*” Hereby it appeareth (saith he) that in

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in the reign of King *Alfred* there was a Court of Chancery out of which writs remedial issued, which Court was not then instituted, but affirmed to be a Court then *in esse*, and enacted that out of this Court writs remedial should be granted without difficulty.

Though it be true that the Court of Chancery hath always been and so in effect stands by prescription, yet in pleading any thing done in Chancery, such plea is not begun with a prescription as in the inferior Courts of Equity, as the Chancery of *Chester* and *Durham*; but a thing done in the Court of Chancery is pleaded as a thing done in the Courts of Common Pleas or King's Bench would be pleaded; —and the reason is, saith my Lord *Hobart*, because they are fundamental courts, as ancient as the kingdom itself, and known to the law; for all kingdoms in their constitutions are with the power of justice, both according to the rule of law and equity, both which being in the King as Sovereign, were after settled in several Courts. Hob. Rep. 63.

In the 9 *Ed. 4.* in a suit in the Court of Exchequer against the Clerk of the Hanaper in Chancery upon his account in the Exchequer, it was affirmed by all the Judges of *England* that the Court of Chancery was the King's Court, and had been time out of mind, so that it was impossible to trace its original.

From these authorities it is evident that the Court of Chancery is as ancient as the rest of the King's Courts; all the Courts of the King having been time out of mind, *so that a man cannot know which of them is the most ancient court*; or at least we have every reason to infer that the antiquity of the Court of Chancery is so very remote, as to preclude and render abortive every attempt to trace with any degree of probable certainty the first commencement of its authority and jurisdiction. 4 Inst. 78. 79. 4 Inst. 78.

What degree of authority or extent of power the Chancellor possessed in those early times, or what share he was invested with in the management and direction of public affairs, are subjects, which the most laborious researches into antiquity will not furnish much information of; for of the functions and concomitant dignities of this high officer the most respectable among the ancient authors speak with diffidence and uncertainty, and afford opportunities only for further conjecture and hypothesis; but however they supply us with information sufficient to convince that the Chancellor was a personage considerable in power, eminent for his learning, revered for his virtues, and high in the opinion and confidence of his Sovereign.

Spel. Gloss.
106, 107.

Seld. Off. of Chan. sec. 3. Dugd. 32, 33. Vid. also the passage there cited from Ingulphus—et antea.

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But whatever was the species or extent of authority which he possessed in the early times we are alluding to, the same was certainly inferior to the authority exercised by the Grand Justiciary, who was next to the King in place of jurisdiction and authority.—By *his* office he presided in the Exchequer, the Chancellor sitting on his left, and he was the first man in the kingdom after the King, and the Chancellor was the first in order on the left hand of the Justiciary; from which we are at liberty safely to presume that *he* was inferior to none but the Justiciary in power and in dignity; for in the language of the ancient authors he (the Chancellor) is described as a great person in Court, and in the Exchequer, for no great thing passed without his consent and advice, and

Spelm Gloss. nothing could be settled without his allowance and privy.
106, 107, 108. Seld. Off. of Chanc. sec. 3. Brady's preface to the Norman History, 152 (F) 153 (A). Vid. also Viner's Abridg. Tit. Chanc.

Towards that part of the *Norman* period when the power of the Grand Justiciary was broken, and the *Aula Regis* was divided into several and distinct jurisdictions, it is highly probable that the authority of the Chancellor became also considerably circumscribed, but that he retained part of that jurisdiction which he exercised during the existence of the *Aula Regis*, viz. the custody of the King's Seal and the right of affixing the same to all writs, patents, charters, commissions, &c. when necessary:—and we are justified in this presumption when it is considered that about this period the King's Court ceased to be ambulatory, it being enacted by *Magna Charta* that “*Communia Placita non sequantur Curiam Regis, sed teneantur in aliquo loco certo*,”—for the Court being thus rendered fixed and stationary, the Judges became so too, and a Chief with other Justices of the Common Pleas were thereupon appointed to hear and determine all pleas of land, and injuries merely civil between subject and subject.

Spel. Gloss.
106, 107.
Seld. Off.
Chanc. sec.
3.

3 Black.
Com. 40.

The whole frame of our judicial polity was new-modelled about this time, and the distribution of common justice was thrown into so provident an order, that the great judicial offices were made to form a check upon each other, the Court of Chancery issuing all original writs under the great seal to the other Courts; the Common Pleas being allowed to determine all causes between private subjects; the Exchequer managing the King's revenue; and the Court of King's Bench retaining the cognizance of pleas of the crown or criminal causes.

Having premised the foregoing observations, we shall proceed to consider the Court of Chancery in three distinct views,

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views, and as exercising three distinct jurisdictions, viz. First, as an *Officina Brevium*; secondly, As a Court of Legal Jurisdiction; and, thirdly, As a Court of Equitable Jurisdiction.

CHAPTER THE FIRST.

Of the Court of Chancery considered as an Officina Brevium.

UPON the division of the Courts, it hath been already observed, that the Chancellor retained the right of affixing the great seal to all patents, commissions, and writs—and hence this Court is considered at this day as the great Shop of Justice, out of which all original writs which give other Courts a jurisdiction do issue, and are made returnable into such courts on a common return day; and from this Court do also issue all commissions of charitable uses, bankrupts, sewers, ideots, lunatics, &c. that pass the great seal; and such writs, commissions and patents, may be sued out at any time, as well in vacation as in term time, from whence this court is said to be always open. 4 Inst. 80, 81.

These writs (relating to the business of the subject) and the returns to them were according to the simplicity of ancient times originally kept in a *Hamper*, in *Hanaperio*; and the other, relating to such matters wherein the crown was immediately or mediately concerned, were preserved in a little sack or bag, *parva бага*, and thence hath arisen the distinction of the Hanaper office, and Petty Bag office, which both belong to the common law court in Chancery. 3 Black. Comm. 49.

Many and important were the advantages which were derived from the institution of this *Officina Brevium*. It demonstrated that all power of judicature whatsoever flowed from the King; and therefore there was a summons even to the Peers of Parliament that sat in *proprio jure*; so likewise for the lower House of Parliament, the basis of the same was made by writs which issued out of this court, and were returned into the same office; and so in matters of judicature, there were particular patents which served to shew the extent of the commission derived under them, and also shewed their power was derived from the crown. 1 Bac. Abr. 586.

The writs were taken out of the court of Chancery, returnable into the other courts, that one court might be a check upon the other; and thereby an admirable uniformity was kept; for whether these writs went out to the

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Sheriff in the nature of a Justices, or whether they were returnable before the Justices in Eyre, or Justices of the Common Bench, or of Assize, they were still made in one form, according to the nature of the complaint, which was both a direction to the Judge and a limitation of his authority.

The court of Chancery being thus erected to issue process, the Chancellor or Lord Keeper that had the government of that court, had the custody of the great seal committed to him, by the authority of which all process was to issue; and from hence Masters were appointed in that court, whose business it was to make out the forms of the writs, and when made, the same were entered in a book called the Register; and such writs were precedents in future for the like cases; and exceptions used to be taken to writs in the courts, to which the same were directed, for not corresponding with the Register.

After the Masters in Chancery had settled the proper form of writs and commissions, and those things began to be of course, the same in process of time came to be settled by the Curitors, who in their original institution were clerks to the Masters.—These officers, viz. Curitors, became afterwards settled into, and at this day form a distinct office, of the peculiar duties of which we shall speak hereafter.

In these times (viz. after the *Aula Regis* was at an end, and its ancient jurisdiction was divided among the several courts which were established upon its ruins), the chief judicial employment of the Chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases in which none was before administered. And to quicken the diligence of the Clerks in the Chancery, who were too much attached to ancient precedents, it was provided by the statute of *Westminster 2^d. c. 13. Edw. 1. c. 24.* that “whosoever from thenceforth in one case a writ shall be found in the Chancery, and in a like case falling under the same right and requiring like remedy no precedent of a writ can be produced, the Clerks in Chancery shall agree in forming a new one; and if they cannot agree it shall be adjourned to the next Parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our Lord the King shall be deficient in doing duty to the suitors.” And this accounts for the very great variety of

* Upon this statute (which vide explained in 2 Inst. 405.) was formed the writ of entry *in consimili casu* relating to land; also upon this statute were founded actions upon the case upon several trespasses, in which cases there were not found any writs in the register. 2 Inst. 407.

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writs of trespass upon the case to be met with in the Register, whereby the suitor had a ready relief, according to the exigency of the business, and adapted to the specialty, reason, and equity of his very case.

The *Magistri Cancellariæ*, or *Clerici*, as they are called in the statute of *West. 2.* were at this time and before associated with the Lord Chancellor for the purpose of assisting him in the formation of writs and the other departments of his then juridical employment; and *Fleta* speaks of them in these words: "*Cui associantur Clerici honesti et circumspēcti, domino Regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorē, quorum officium sit supplicationes et querelas conquerentium audire et examinare, et eis super qualitatibus injuriarum ostensarum debitum remedium exhibere per brevia Regis.*" And the writs agreed upon by the Master Clerks were called *Magistralia*, in contradistinction to those which were framed by the Curfitors, or Clerks to the Masters, and were called *Brevia formata de Cursu*. Fleta, lib. 2. c. 12. 2 Inst. 407.

Having considered the court of Chancery as an *Officina Brevium*, I shall in the next place speak of the ordinary court in Chancery proceeding according to Law.

CHAPTER THE SECOND.

Of the legal Jurisdiction of the Court of Chancery.

TO understand the nature of this court we shall in the first place observe, that in ancient times the Chancellor was likewise Chaplain to the King, and it was a branch of his department in the time of the *Justiciar* to write the *Diplomata*, that is, all charters and commissions from the King; therefore when the power of the *Justiciar* was broken, he obtained the *officina brevium et chartarum*; and from thence all the extraordinary jurisdictions touching the granting of charters, as likewise all inquests of office to entitle the crown, were returned into this court; and the Exchequer, in which these were anciently transacted, became only an ordinary court of the revenue, to set leases to the King's farms and to get in the King's debts; and therefore the office in the Exchequer became only an office of instruction of what lands belonged to the King in particular counties; but to vest lands in the crown *de novo*, and also to grant lands from the crown, unless they were merely farms

2 Co. 16.

4 Co. 93.

Plowd. 340.

Gilb. Hist.

View of the

Exchequer.

5 Co. 52.

10 Co. 115.

Page's Case.

Of the Court of Chancery.

farms that were granted for years, it was necessary to have an office under the great seal.

- 2 Inst. 552. With respect then to the ordinary or legal court in
 4 Inst. 79. Chancery, it has been a court of record time out of mind,
 1 Nev. 142. and sheld *coram Domino Rege in Cancellaria*, on the Petty
 4 Inst. 79. Bag side; and from hence at this day this court hath jurisdic-
 80, 81, 82. tion to hold plea upon a *scire facias*, to repeal letters
 27, 88. patent at the suit of a former patentee, when they are
 12 H. 6. granted to several persons for one and the same thing; but
 c. 1.—3 E. when they are against law, or granted upon a false sugges-
 6. c. 4. tion, the King may have a *scire facias* to repeal his own
 13 El. c. 6. grant by letters patent. This court may also hold plea of
 34 Edw. 3. *monstrans de droit*, traverses of offices, and the like; when
 c. 14.—36 the King hath been advised to any act, or is put in possession of
 Ed. 3. c. 15. any lands or goods, in prejudice of a subject's right; on
 4 Rep. 54. proof of which, as the King can never be supposed inten-
 Vide also tionally to do any wrong, the law questions not but he will
 Lam. Arch. immediately redress the injury; and refers that conscien-
 58. El. 29. tious task to the Chancellor, the keeper of his conscience.—
 23 H. 8. There may also be a *scire facias* upon recognizances in this
 c. 6. court, and also executions upon a statute staple, but the execu-
 tion upon a statute merchant is returnable either to the King's
 Bench or Common Pleas. It also appertains to this court
 to hold plea of all personal actions where any officer or
 minister of the court is a party. It might likewise hold plea
 (by *scire facias*) of partitions of lands in coparcenery, and
 of dower, where any ward of the crown was concerned in
 interest, so long as the military tenures subsisted; as it
 now may also do of tithes of forest lands, where granted
 by the King, and claimed by a stranger against the grantee
 of the crown; but this court cannot hold plea of land, but
 it may of trespass or debt*.
 20. H. 6. The process in this court is under the great seal, and is
 32. now in *English*, as are all other law proceedings by the
 statute 4 Geo. 2. c. 26.; but the proceedings in this court
 are not enrolled in rolls, but remain in *filaciis*, being filed up
 4 Inst. 80. in the office of the Petty Bag.

If in this court the parties descend to issue, the Chancellor cannot try it, but is to deliver the record with his *proper hand*† into the King's Bench to be tried there, because for that purpose both courts are accounted but one; and more-

* And therefore when a suit was in the Chancery of Chester for a woman's jointure, a prohibition was granted.—1 Sid. 89. 2 And. 264.

† But an Officer delivering the record is sufficient: vide 2 Saunders 157. and the Prince's case, 30 Co. and Mich. 1740, the King and Warden of the Fleet.

over, the Chancery being an *officina brevium*, if it could both make writs returnable here, and also try issues, it would encroach too much on the jurisdiction of the courts of law, and besides there was no jury process in the ancient *Aula Regis*; but if there be a demurrer in law, it shall be argued and adjudged in Chancery; and it has been said that after trial the record is to be returned into Chancery, and judgment to be given there *.

4 Inst. 80.

When there is a demurrer upon part, and issue upon part, the record being in the King's Bench, that court ought to give judgment, because there can be but one execution; and if the record come thither entirely, they cannot send it back again; though it was said, that the Chancery might have given judgment upon the demurrer before the record came into the King's Bench^a.

2 Saund. 23.
24. 1 Mod.
29. 1 Sed.
438. 1 Lev.
283, 284.
a 2 Keb.
584. 587.
588. 600.
1 Lilly 499.
b Dyer 315.
c 4 Inst. 80.

A writ of error was moved for into the King's Bench on a judgment in the Petty Bag, but denied; and the Lord Keeper was pleased to think *Dyer*^b and *Coke*'s^c opinion ill founded, and thought the jurisdiction of the Chancery on the *Latin side* ought not to be controlled by the King's Bench, and said he would injoin all such writs of error†.

An inquisition was taken, and a forfeiture of the office of warden of the Fleet, and the defendant pleaded to issue, and after issue joined, several other persons came in by way of *monstrans de droit*, and pleaded, and a demurrer to them, and the record was carried into the King's Bench by the Clerk of the Petty Bag, without any order of the court, in order to have the issue tried; and it was resolved, 1st, that though the Clerk had committed a fault to the court of Chancery in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer is done by my Lord Chancellor, and may be said to be done *propria manu*; 2d, that though there were an issue and demurrer both, yet the removing the whole record was proper and well enough on the authorities in the margin, by which it appears that judg-

8 Co.
Prince's
case.
2 Saund. 6.
63. 157.

* But quære whether the constant practice has not been otherwise.—Vide All. 16. 17. Stil. 84—94. Cro. Jac. 12. 2 Roll. Abrid. 349. and 2 Saund. 27. where it is resolved that if there be a demurrer for part and issue for part, the whole record shall be transmitted into B. R. and the judgment given there, and 2 Saund. 23. S. P. and then said that the books cited 3 Inst. 80. do not warrant the opinion; but if the issue is to be tried otherwise than by a jury, as by a Bishop's certificate, &c. judgment shall be given in Chancery. 1 Jon. 80. Lat. 3.

† 1 Vin. 131. But that upon a judgment given in this court a writ of error doth lie returnable into the King's Bench, vide 13 Edw. 3. 25 Ap. 24. Dyer 315. Plowd. 393. And by Lord Coke the stile of the King's Bench is *Coram Rege*, but the title of the Chancery is *Coram Rege in Cancellaria*, and *addito probat minoritatem*.

ment

Of the Court of Chancery.

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2 Inst. 552.

4 Inst. 79.

1 Nev. 142.

4 Inst. 79.

80, 81, 82.

87, 88.

18 H. 6.

c. 1.—3 E.

6. c. 4.

13 El. c. 6.

34 Edw. 3.

c. 14.—36

Ed. 3. c. 15.

4 Rep. 54.

Vide also

Lam. Arch.

58. El. 29.

23 H. 8.

c. 6.

20. H. 6.

32.

4 Inst. 80.

With respect then to the ordinary or legal court in Chancery, it has been a court of record time out of mind, and held *coram Domino Rege in Cancellaria*, on the Petty Bag side; and from hence at this day this court hath jurisdiction to hold plea upon a *scire facias*, to repeal letters patent at the suit of a former patentee, when they are granted to several persons for one and the same thing; but when they are against law, or granted upon a false suggestion, the King may have a *scire facias* to repeal his own grant by letters patent. This court may also hold plea of *monfrans de droit*, traverses of offices, and the like; when the King hath been advised to any act, or is put in possession of any lands or goods, in prejudice of a subject's right; on proof of which, as the King can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the Chancellor, the keeper of his conscience.—There may also be a *scire facias* upon recognizances in this court, and also executions upon a statute staple, but the execution upon a statute merchant is returnable either to the King's Bench or Common Pleas. It also appertains to this court to hold plea of all personal actions where any officer or minister of the court is a party. It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenery, and of dower, where any ward of the crown was concerned in interest, so long as the military tenures subsisted; as it now may also do of tithes of forest lands, where granted by the King, and claimed by a stranger against the grantee of the crown; but this court cannot hold plea of land, but it may of trespass or debt*.

The process in this court is under the great seal, and is now in *English*, as are all other law proceedings by the statute 4 Geo. 2. c. 26.; but the proceedings in this court are not enrolled in rolls, but remain in *filaciis*, being filed up in the office of the Petty Bag.

If in this court the parties descend to issue, the Chancellor cannot try it, but is to deliver the record with his *proper band*† into the King's Bench to be tried there, because for that purpose both courts are accounted but one; and more—

* And therefore when a suit was in the Chancery of Chester for a woman's jointure, a prohibition was granted.—1 Sid. 89, 2 And. 264.

† But an Officer delivering the record is sufficient: vide 2 Saunders 157. and the Prince's case, 30 Co. and Mich. 1780, the King and Warden of the Fleet,

over, the Chancery being an *officina brevium*, if it could both make writs returnable here, and also try issues, it would encroach too much on the jurisdiction of the courts of law, and besides there was no jury process in the ancient *Aula Regis*; but if there be a demurrer in law, it shall be argued and adjudged in Chancery; and it has been said that after trial the record is to be returned into Chancery, and judgment to be given there*.

4 Inst. 80.

When there is a demurrer upon part, and issue upon part, the record being in the King's Bench, that court ought to give judgment, because there can be but one execution; and if the record come thither entirely, they cannot send it back again; though it was said, that the Chancery might have given judgment upon the demurrer before the record came into the King's Bench^a.

2 Saund. 23.
24. 1 Mod.
29. 1 Sed.
438. 1 Lev.
283, 284.
a 2 Keb.
584. 587.
588. 600.
1 Lilly 499.
b Dyer 315.
c 4 Inst. 80.

A writ of error was moved for into the King's Bench on a judgment in the Petty Bag, but denied; and the Lord Keeper was pleased to think *Dyer*^b and *Coke*'s^c opinion ill founded, and thought the jurisdiction of the Chancery on the *Latin side* ought not to be controlled by the King's Bench, and said he would injoin all such writs of error†.

An inquisition was taken, and a forfeiture of the office of warden of the Fleet, and the defendant pleaded to issue, and after issue joined, several other persons came in by way of *monstrans de droit*, and pleaded, and a demurrer to them, and the record was carried into the King's Bench by the Clerk of the Petty Bag, without any order of the court, in order to have the issue tried; and it was resolved, 1st, that though the Clerk had committed a fault to the court of Chancery in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer is done by my Lord Chancellor, and may be said to be done *propria manu*; 2d, that though there were an issue and demurrer both, yet the removing the whole record was proper and well enough on the authorities in the margin, by which it appears that judg-

8 Co.
Prince's
case.
2 Saund. 6.
63. 157.

* But quære whether the constant practice has not been otherwise.—Vide All. 16. 17. Stil. 84—94. Cro. Jac. 12. 2 Roll. Abrid. 349. and 2 Saund. 27. where it is resolved that if there be a demurrer for part and issue for part, the whole record shall be transmitted into B. R. and the judgment given there, and 2 Saund. 23. S. P. and then said that the books cited 3 Inst. 80. do not warrant the opinion; but if the issue is to be tried otherwise than by a jury, as by a Bishop's certificate, &c. judgment shall be given in Chancery. 1 Jon. 80. Lat. 3.

† 1 Vin. 131. But that upon a judgment given in this court a writ of error doth lie returnable into the King's Bench, vide 13 Edw. 3. 25 Ap. 24. Dyer 315. Plowd. 393. And by Lord Coke the stile of the King's Bench is *Coram Rege*, but the title of the Chancery is *Coram Rege in Cancellaria*, and addito *probat minoritatem*.

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ment is most properly to be given in the King's Bench both on the issue and on the demurrer, otherwise there might be two distinct judgments, and consequently distinct executions taken out.

Mich. 1700,
between the
King & the
Warden of
the Fleet,
1 Vern.
131.

The result therefore of the several cases which may be collected upon this subject (if we except the opinion of the Lord Keeper *North*) seems to amount to this, that when a judgment is given in the ordinary or legal court in Chancery, upon demurrer, or the like, a writ of error, in nature of an appeal, lies into the court of King's Bench, as the high and supreme court of justice, which superintends and corrects (where there is occasion) the decisions of inferior legal courts; and the learned Sir *William Blackstone* observes, that the opinion of the Lord Keeper *North*, (viz.) that no such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

3 Bl. Comm.
408. in a
note there.

This court is always open; so that if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant a *habeas corpus*, and do him justice according to law; but neither the King's Bench nor Common Pleas can grant that writ, but in term time; and this court may grant it in term time or in the vacation, as occasion may require. So likewise this court may grant prohibitions at any time either in term or in the vacation, which writs of prohibition are not returnable into this court; but if they are not obeyed, this court may grant an attachment upon the prohibition, returnable either into the King's Bench or Common Pleas.

4 Inst. 31.

If the issue arises in a county palatine, the Chancellor ought to deliver the record into the King's Bench, and they to write to the county palatine to try and return it to the King's Bench; for the Chancellor cannot write to the county palatine to try the issue, neither can he transmit the record to be tried there or in the Common Pleas.

Jones 82.
3 Bullstrode
305.

All personal actions by or against any officer or minister of this court in respect of their service or attendance, may be determined in this court; but in these no jury process can issue, but the record is to be removed into the King's Bench: but so little is usually done in the common law side of the court, that according to Mr. Justice *Blackstone*, there are no traces to be met with of any writ of error being actually brought since the fourteenth year of Queen *Elizabeth*, A. D. 1572.

Having considered the ordinary court in Chancery proceeding according to law, I shall in the next place speak of the extraordinary court proceeding according to equity.

CHAPTER THE THIRD.

Of the Court of Chancery considered as a Court of equitable Jurisdiction.

IT is difficult to discover by what means the courts of justice in *England*, usually termed courts of equity, have obtained the jurisdiction which they now exercise, and those who have attempted accurately to describe those courts have generally failed.

Mitford's
Chanc. p. 3

And it is observable that the distinction between law and equity, as administered in the different courts of justice in this country, is not at present known, nor seems to have been known in any other country at any time; and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the *Romans*, the *ius prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws; but the power of both centered in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it in particular cases by the principles of equity; and with us too the *Aula Regis*, which was the supreme court of judicature, undoubtedly administered equal justice, according to the rules of both, or either, as the case might chance to require; and when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition.

3 Black.
Com. 49.

Lambard in his *Archaion* says, that when the courts of Chancery and King's Bench ceased to be ambulatory, and became settled courts in a certain place, that then the King committed to his Chancellor, together with the charge of the great seal, his only legal, absolute, and extraordinary pre-eminence of jurisdiction. But the writ or proclamation, 22 *Edw. 3.* directed to the Sheriffs of *London*, by them to be made public, seems to have given it an establishment; by which the King commanded that all business relating as well to the common law of the kingdom, as to such by special grace cognizable by him, should be prosecuted before the Chancellor. And this delegation afterwards received the sanction of an act of parliament, which act*, as

* But quere, for which vide the petitions of the Commons against this new invented jurisdiction. 3 H. 4. No 69. 4 H. 4. No 78. 3 H. 5. No 46. 1 Roll. Abridg. 372. 1 Lev. 242.

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some think, first gave the Chancellor authority in equitable matters.

It is evident however that this court did from this time exercise a jurisdiction in matters of equity, as appears from the Parliament-rolls in the reign of *Edw. 3.*; and the complaints made in Parliament of the exercise of this power to the subversion of the common law, form a manifest inducement to this opinion:—and the extraordinary power exercised by the Chancellor of that day was doubtless the occasion which procured the enacting the statute of the 17 *Ric. 2. c. 6.* which reciting that people were compelled to come before the King's council, or in the Chancery, by writs grounded upon untrue suggestions, directs, that the Chancellor for the time being, presently after such suggestions are duly found and proved untrue, shall have power to ordain and award damages according to his discretion.

From the history then of these times, and the representations made to the King of the new and extraordinary power exercised by the Chancellor, it is very evident, that he possessed an authority of no small consideration in the judicial policy of that day; but whatever degree of authority he possessed in the administration of justice, it is observable that though equity is mentioned by *Bracton* as a thing contrasted to strict law, yet neither in that writer, nor in *Glanvil*, or *Fleta*, nor yet in *Britton* (composed under the auspices and in the name of *Edw. 1.* and treating particularly of courts and their jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the court of Chancery.

3 Black. 50.

Ibid.

It seems therefore probable that when the courts of law, proceeding merely upon the ground of the King's original writs, and confining themselves strictly to that bottom, gave a harsh and imperfect judgment, the application for redress used to be to the King in person assisted by his Privy Council; and they were wont to refer the matter to the Chancellor and a select committee, or by degrees to the Chancellor only, who mitigated the severity, or supplied the defects pronounced in the courts of law, upon weighing the circumstances of the case.

This was the custom in the times of the *Saxons* and of the *Danes*, that the King by himself did hold a high court of justice, wherein he sat in person, and did judge not only according to law and mere rights, but also after equity and conscience; and this is confirmed by the law of the *Saxon King Edgar*, (*viz.*) “ Let no man seek to the King in matters of variance, unless he cannot find right at home; but if the right be too heavy for him, then let him seek to the King

Sax. Laws,
fol. 79.

King to have it lightened."—And the like to this law is also among the laws of *Canute the Dane*. Sax. Laws, fol. 108.
2 Elef. 12.

That this was also the custom after the dissolution of the *Aula Regis* in the reign of King *Edward 1.* appears from *Lambard*, who in his *Archaion* says, that matters of grace were only determinable by the King, or by such as he appointed, and not in any fixed or established courts of equity; so that those who sought relief in equity were suitors to the King himself, who being assisted by his Chancellor and Council, did mitigate the severity of the law in his own person, when it pleased him to be present, and did in his absence refer petitions sometimes to the Chancellor alone, and at other times to the Chancellor, and some other of his Council; and none of the ancient lawyers who speak of this Chancery ever mention it as a court of equity or conscience, but always as a court of ordinary jurisdiction, which determined causes according to the form and rule of the common law. Ibid.
63, 64.
2 Inst. 552.
1 Lev. 242.

My Lord *Coke* says, that the first decree in Chancery that he finds made by the Chancellor was in 17 R. 2. *John de Windfor* against *Richard le Scrope*; and *Lambard* saith again, that in our reports of common law, there is not any mention of causes before the Chancellor for help in equity, but only from the time of *Hen. 4.* in whose days, by reason of intestine troubles, feoffments to uses did either first begin, or else grow common and familiar; for remedy in which cases of uses (saith he) chiefly the court of Chancery was then fled unto as the common altar of help and refuge. Nor are any bills and decrees to be found in Chancery before the 20th of *H. 6.* such cases as since that time have been determined in this court, having formerly been determined, according to *Dugdale*, in the lower house of Parliament, as may be seen (saith he) from the number of petitions in Parliament of that nature which are yet extant. 2 Inst. 55.
4 Inst. 83.
Archæ. 75.

And the Lord *Ellesmere* seems to confirm all this, for he writes that there is no record of proceedings by way of petition or *English* bill, before that time, viz. the time of *H. 6.*—but reports, records, and cases (saith he), are plentiful enough in its ordinary jurisdiction long before. Obs. on the office of Lord Chancellor 57.
58.
* Anno 20

H. 6. there are some bills in French, as appears by the records of that year. Vide also Elef. 45.

To what cause then is the rise and establishment of the equitable jurisdiction of the court of Chancery to be attributed? and upon what principle and reasoning shall we be able to account for its extraordinary progress in power and authority,

thority, so that from a very small and inconsiderable beginning it hath grown up and increased to that plenitude of jurisdiction as to make it an object of considerable jealousy at this day to the common law courts?

Instance the equitable rule of decision adopted of late years by the common law courts.

The histories of those early days (particularly that portion of our history which includes the interval of time between the reigns of *Edw. 1.* and *Hen. 4.*), the conjectures of learned antiquarians, the opinions of ancient lawyers collected from the reports, and the peculiar circumstances which gave rise to the introduction and establishment of uses, form a collection of materials which tend greatly to assist in the illustration of this point.

Vide the statute, and Lord Coke's Commentary upon it.

The probable and indeed reasonable result to be collected from these authorities united seemeth then to centre in this; (viz.) first, that the equitable jurisdiction of the court of Chancery principally derives its establishment from the construction which was put by *Bishop Waltham* upon the statute of *West. 2. c. 24.*—and, secondly, that the increase of its authority is to be attributed to the subsequent introduction of uses.

By the statute of *West. 2. c. 24.* we have before observed, a power was given in new and extraordinary cases, to invent a new writ; and when about the reign of *Edw. 3.* uses of lands were first introduced, and though totally discountenanced by the courts of common law, were considered by the clergy (by whom those uses were first invented to elude the statute of mortmain) as fiduciary deposits and binding in conscience; it was then that *John Waltham*, then Bishop of *Salisbury*, and Chancellor, out of his subtilty, as the Commons mention in their petition, found out and began a novelty against the form of the common law; and that was the invention of the writ of *subpœna*, which writ summoned the party to appear under a pain, to answer to such things as should be objected against him; and a petition was lodged in Chancery, containing the articles to which he was obliged to answer; and upon such articles this new-invented writ issued.

By this construction not only a new writ was framed, but a new jurisdiction erected, and this was towards the time of *R. 2.* occasioned chiefly by the statute of mortmain; for when that statute had restrained the growing riches of the clergy, they found out this invention to avoid its operation and effect; and that was by giving away lands to trustees for pious uses, and the feoffees of such trust performed the necessary duties attached to such lands in behalf and for the benefit of the trust; but in case they perverted the trust,

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the ordinary jurisdiction not reaching a thing that was against the statute of mortmain, the Chancellor exerted this extraordinary jurisdiction, and examined the party upon oath as to the facts alledged against him, and by virtue of this new authority, derived from this forced construction put upon the statute of *West. 2. c. 24.* compelled a performance of the trust.

This construction of the statute of *Westminster 2.* being once firmly established, the superstructure which was built upon it by the ecclesiastical Chancellor of those days became in a short time too closely cemented, to be easily overturned; added to this, the doctrine of uses became about this time a favourite doctrine in the nation: the intestine divisions occasioned by the ambition of the two rival houses of *York* and *Lancaster* served but to add stability to this doctrine, and to encourage the daily practice of it; inasmuch as it was by the aid and assistance derived from the operation of uses, that the powerful and opulent were enabled to preserve their honours and estates in their families, and to elude the effects of confiscations and attainders, so frequent in those days.

From what has been observed it may perhaps be reasonably presumed, that the construction put by the ecclesiastical Chancellors of those days upon the statute of *Westminster 2. c. 24.* is the great pillar upon which the equitable jurisdiction of the court of Chancery is built; and that the subsequent introduction of uses lent a strong and helping hand to raise the building from its foundation:—but the magnitude and beauty of the fabric as it now stands was not to be completed in those rude and unpolished days; that work indeed was reserved for the subsequent ages of commercial activity, and the enlightened policy of judicature which was established and prevailed in still succeeding ones; circumstances which will be more largely observed upon in another place.

But it is not to be supposed that the equitable jurisdiction of this court was established without opposition, or that after its establishment its authority was tamely submitted to; on the contrary, violent was the resistance which marked the first establishment of this jurisdiction, and powerful the means which were used to stifle it in its infancy, and prevent its progress towards maturity; for we find from the *Parliament-rolls*, that in the reigns of *Hen. 4.* and *5.* the Commons were repeatedly urgent to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtily of Chancellor *Waltham* against the form and in subversion of
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the common law ; but though *Hen. 4.* being then hardly warm in his throne, gave a palliating answer to these petitions, and actually passed the statute 4 *Hen. 4. c. 23.* whereby judgments at law are declared irrevocable unless by attainr or writ of error, yet his son put a negative at once upon their whole application, and in *Edward* the fourth's time the process by bill and *subpœna* were become the daily practice of the court.

But this did not extend very far ; for in the ancient treatise *Diversite des Courtes*, supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in Chancery, which fall within a very narrow compass.—No regular judicial system at that time prevailed in the court, but the suitor when he thought himself aggrieved found a desultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman, no lawyer having sat in the court of Chancery from the time of the Chief Justices *Thorpe* and *Kayvel*, successively Chancellors to King *Edward 3.* in 1372—1373, to the promotion of Sir *Thomas More* by King *Henry 8.* in 1530, after which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according to the convenience of the times and the disposition of the Prince, till Serjeant *Pickering* was made by Queen *Elizabeth* Lord Keeper in 1592 ; from which time to the present the court of Chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the great seal was intrusted to Doctor *Williams* then Dean of *Westminster* and afterwards Bishop of *Lincoln*, who had been Chaplain to Lord *Elles-*

3 Black. 53. *mere.*

and note—the Reader will find in Spelman's Gloss. p. 109, 110, 111, 112. a list of all the Chancellors of England from the time of Edward the Confessor to the time of James 2.

It appears very probable that as the commerce and riches of the nation increased, the power and authority of this court increased in proportion ; for we find that in the reign of Queen *Elizabeth*, at which period the opulence, power, and commercial resources of this country had attained to a very considerable degree of maturity, sequestration was become and ruled to be a necessary process of the court, and the Chancellor was in the frequent practice of exerting this formidable engine of his authority to compel from the contumacious an obedience to his jurisdiction. The exercise therefore of this power, viz. sequestration, was the occasion
of

of considerable differences between the courts of equity and common law; the Judges of the latter court maintaining that the Chancellor could not sequester the party's lands in case of a non-obedience to his decree, or in other words, that he had only the power *agere in personam et non in rem*; for it was admitted even by the common law Judges that if a man was sued in a court of conscience, i. e. of equity, and refused obedience to that court, the body of the delinquent might be imprisoned, but that no commission ought to be awarded for the taking his goods, or the sequestration of his lands; and agreeable to this doctrine it was held in the 16 of *Eliz.* by the Judges of the King's Bench in the case of *Coleston* and *Gardiner*, that if a man killed a sequestrator in the execution of such process, it was no murder.

Cro. Eliz.
651. Bro-
grave and
Watts,
4 Inst. 84.
1 Rol. Rep.
86. 190.
Let. Rep.
166.

But these resolutions of the common law Judges did not long stand; for as the court of equity was soon found to be productive of considerable benefit and utility to the subject, by providing and furnishing relief in cases, the peculiar circumstances of which perhaps made it impossible for an injured party to obtain adequate relief at law; and particularly as this court afforded protection and refuge to the inexperienced and unwary from the tricks, chicanery, and imposition of the artful and knavish; and as with the increase of commerce and opulence frauds of the last description multiplied in proportionable abundance, it was found necessary to maintain, support, and carry into effect the decrees of this court, and to prevent the same from being rendered illusory; for it was argued in favour of the court of Chancery—first, that the extraordinary jurisdiction might punish contempt by the loss of estate, as well as imprisonment of the person, because that, liberty being a greater benefit than property, if they had power to commit the person, they might take from his estate till he had answered and made satisfaction for his contempt;—secondly, to say that a court should have a power to decree about things, and yet should have no jurisdiction *in rem*, was a perfect solecism in the constitution of the court itself.

The many substantial advantages to be derived from the use and operation of the process of sequestration, the good sense contained in the reasoning and arguments advanced in favour of the process, by degrees produced and effected a change of opinion in the common law Judges.—All opposition to the use of this process was laid aside, and the court of King's Bench in not persisting to maintain that resistance to it was lawful, did in fact give up the contest, and tacitly acknowledge the legality of the process of sequestration, and the benefits derivable from the use of it.

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3 Bl. Com.
53, 54.

And in this place it may not be improper to observe, that in the time of Lord *Ellesmere* (*A. D.* 1616) arose that notable dispute between the courts of law and equity set on foot by Sir *Edward Coke*, then Chief Justice of the court of King's Bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a Master in Chancery, for having incurred a *præmunire* by questioning in a court of equity a judgment in the court of King's Bench obtained by gross fraud and imposition. This matter being brought before the King (*Jac.* 1.), was by him referred to his learned Council for their advice and opinion, who reported so strongly in favour of the court of equity, that his Majesty gave judgment in behalf of that court, and Sir *Edward Coke* submitted to the decision.

The age then of *Elizabeth* and her successor *James* the first forms the era of the aggrandizement and increasing power of this court; and it is from thence that we are to date the complete and perfect establishment of that equitable jurisdiction which this court has ever since continued and still continues to exercise with so much effect to the general benefit and advantage of the nation at large; and it is not difficult to adduce very probable reasons for its aggrandizement at this particular period.

Luxuries in an abundance unknown to former ages were imported from foreign and distant climes; and as a necessary consequence the wants and necessities of mankind increased in proportion; their manners, habits, and dispositions underwent a gradual and progressive change in proportion as their artificial wants multiplied, and every addition to the increasing wealth and prosperity of the nation brought with it its concomitant luxury. The views, pursuits, contracts, and engagements of individuals became more various, complicated, and interesting; and from thence a more wide and extensive field was opened for the exertion of genius, the activity of enterprise, and the labour of industry.—Mankind found themselves from thence involved in new situations, and interested in enterprises which their ancestors were strangers to; but as those situations became perplexing, and those enterprises damped by untoward circumstances, the ingenuity and craft of individuals were not found deficient in the invention of the means of extrication, or their resolutions tardy in the adoption of those means.

From thence arose a multiplicity of frauds unknown to the simplicity of preceding ages; and it became therefore necessary that the injured should be relieved, and the aggrieved

grieved redressed, in situations and cases which the policy of the common law had not provided against, and indeed could not have foreseen. The relief then to be obtained through the medium of the common law courts was found to be inadequate to the extraordinary exigencies occasioned by circumstances, novel as well as various in their kinds; for being bound to establish forms of proceeding, they could not but be embarrassed, when to the intricate and complicated subjects of litigation, the result of commerce, riches, and luxury, they came to apply the rigid rules of decision established in the common law courts.

Early therefore in the history of our jurisprudence, the administration of justice appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles upon which the ordinary courts also decide, when those courts, or their mode of proceeding, are insufficient for the purpose, and of deciding on the principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent; and various are the modes in which a court of equity thus exercises its jurisdiction beneficially to the subject.

From the period I am now alluding to, down to the present, the business and power of this court have increased to an amazing degree; a system of jurisprudence has been established upon wise and rational principles, and through the medium of its powerful assistance, redress in almost every possible case of injury (a remedy for which the common law has not provided) is attainable: and though formerly considered as an enormity requiring redress, and its infancy had to contend with powerful and obstinately persevering opposition, by slow and progressive degrees it increased in authority, till at length it overcame all opposition, and matured into that greatness and plenitude of power we at present behold it in the possession of.—And this leads me to consider the jurisdiction which this court exercises at this day.

Of the Jurisdiction which the Court of Chancery exercifes at this Day.

CHAPTER THE FIRST.

Yelv. 227. **T**HE court of Chancery in proceedings by *English* bill is no court of record;—but notwithstanding, its jurisdiction is of vast extent, and has been generally divided into three parts, viz. Fraud, Trust, and Accident; but independent of these, specific performances of agreements, portions, powers, wills, devises and legacies, executors and administrators, form very considerable branches of relief which come within the cognizance of the equitable jurisdiction of this court.

10 Mod. 1.

4 Inst. 84.

It is proposed therefore to select a few resolutions of courts of equity upon each of these several branches, a method which it is presumed will furnish information as well of the general extent of jurisdiction which these courts have assumed in the exercise of equitable jurisprudence, as of the principles upon which those resolutions are founded.

Of these several heads I shall treat in the order in which they stand; and 1st,

Of Fraud.

2 P. Wms
254.

ALL frauds are cognizable in equity as well as at law, and therefore it is no objection that the parties have their remedy at law, and may bring actions for money had and received to their own use; for in cases of fraud, the court of Chancery has a concurrent jurisdiction with the common law; matters of fraud being the great subject of relief here.

13 Vin. Ab.
541. pl. 9.
1 Ver. 277.

Equity has so great an abhorrence of fraud, that it will set aside its own decrees if founded thereupon; and a bill in equity lies to vacate letters patent obtained by fraud.

In cases of fraud, equity will relieve even against the words of the statute of frauds; as if one agreement in writing should be proposed, and another fraudulently or secretly brought in and executed, in lieu of the former; in this, or such like cases of fraud, equity will relieve, but
where

where there is no fraud, only relying upon the honour, word or promise of the defendant, the statute of frauds making these promises void, equity will not interfere.

Voluntary conveyances are always fraudulent against purchasers, and therefore any person coming in by a voluntary conveyance, and pursuing a purchaser at law, shall be obliged to discover his title in a court of equity; because it is against conscience to proceed to disquiet such purchaser upon a mere voluntary conveyance, for the purchaser has a right to know what dormant titles such volunteer has to set up against him.

A difference has been held between the statute of fraud of the 13 *Eliz.* which is in favour of creditors, and 27 *Eliz.* in favour of purchasers. Upon the 27 *Eliz.* every voluntary conveyance made where there is afterwards a subsequent consideration for valuable consideration, though no fraud in the first conveyance, nor the person making it at all indebted, yet the rule is, that such mere voluntary conveyances are fraudulent and void at law against the subsequent purchaser; and there is no occasion to come into a court of equity to make it void, unless there is a colourable consideration on the face of the deed.

But the difference between that and the 13 *Eliz.* is this: "If there is a conveyance which is voluntary, of real estates or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, if the voluntary conveyance is for a child, and no particular evidence of fraud, that will be good; but if any marks of fraud, collusion, or intent to defraud subsequent creditors appear, or if the owner be upon the brink of being indebted, that will make it void; but there is no case where a man indebted at the time makes a mere voluntary conveyance to a child without consideration and dies indebted, but it will be void and considered as part of his assets."

Note; The statute of 13 *Eliz.* varied from the common law, for before the statute if any one impeached a deed as fraudulent in respect of creditors, he must have shewn that he was a creditor at the time of executing the deed, and also that he was injured by it; but the statute makes this unnecessary, for if a voluntary deed be made by a person in debt, it is fraudulent against creditors; and if it appears that the person making it was indebted at all, though not to the person impeaching it, it is sufficient; but the creditors must shew him indebted, or to be in a situation that will make the deed fraudulent, as being upon the very brink of ruin; and this is a *sine qua non*, and was determined so.

2 Vef. 10,
11.
In Cowper
R: p. 80.
Lord Mans-
field doubts
whether this
was said by
Lord Hard-
wicke; but
afterwards,
in Cowper,
710, 711.
he thinks
such convey-
ance good.
Vid. also 1
Atk. 265.
2 Brown, 90.
1 Atk. 15.
94.
Middlecome
and Marlow,
per Lord
Hardwick,
20th Feb.
1742.

Of the Court of Chancery.

1 Alleyce
tit. Bank-
rupt.

This is the law on the 13 *Eliz.*; but where a man is not indebted at the time of making the very deed, and afterwards becomes a bankrupt, this is absolutely void against his creditors by 21 *Jac.* 1. but he must be a trader at the time.

3 Wms. 398.

But it has been held, that when a man who was not a tradesman, nor indebted, made a voluntary settlement on his child, and *long* after became a bankrupt, the same was good against creditors.

Prec. in Ch.

14. 15.

2 Show. 4. b.

2 Ver. 44.

161. 2 327.

Bac. Tracts

310.

But it has

been since decreed in the House of Lords, that a will of a real estate could not

be set aside in a court of equity for fraud or imposition, but must be tried at law

on *deviavit vel non*, being more proper for a jury. July 28th, 1728. *Bransby*

v. Thuridge. 2 v. Abridg. Eq. 764. c. 4.

Prec. in Ch.

123.

2 Ver. 307.

Vid. Cope

and Tracy,

2 Ver. 700.

cont. See

also 1 Ab.

Eq. 406.

2 Ch. Caf.

236.

2 Will. R.

270.

See vid. 1

Will. 287.

contra.

1 Wms 239.

A will as well as a conveyance may be set aside in this court for fraud and circumvention, though the latter be executed by deed and fine; but Lord Commissioner *Jekyll* took a difference betwixt a deed and a will gained from a weak man and upon misrepresentation or fraud; for if a will be gained from a weak man and by false representation, that is not a sufficient reason to set it aside in equity, as was determined in the case of the Duke of *Newcastle's* will, between Lord *Thanet* and Lord *Clare*, and in the case of *Bodvil* and *Robarts*; but when a deed (which is not revocable as a will is) is gained from a weak man upon a misrepresentation, and without any valuable consideration, the same ought to be set aside in equity.

Suppresso veri or *suggestio falsi* is either of them a good reason to set aside any release or conveyance; as where a devisee under a will defectively executed, represents the will duly executed, and for a small sum gains a release from the heir, the release was set aside.

So where on a treaty of marriage the lady's attorney told the intended husband, that his client desired a remainder might be limited to him, the husband consented, and when the settlement was read, the lady objected to this remainder; whereupon the gentleman acquainted her that it was done at her request, which she denied. But it being a remote remainder, and they unwilling to defer the marriage, the writings were executed; but the remainder was afterwards set aside as a fraud and imposition.

Hill. 5 Geo.
Morris and
Rixon in
Ch. 1
Strange 144.

If a man obtains a bond or covenant by fraud, which is not negotiable, then if such covenant or bond be assigned over to a third person for valuable consideration, without notice of the fraud, yet such assignee shall not recover, because the bond or covenant being originally got by fraud, though the obligee or covenantee had obtained the solemnities of contracting, yet having obtained them so as they did not bind in a court of equity, the contract creates no obligation there, and therefore the assignee, who had no title at law, because he must sue in the name of the person who committed the fraud, is not entitled to any relief in a court of equity.

If a man alienes by a voluntary conveyance, and the alienee sells for valuable consideration, the land is for ever bound; for this is not like the former case, because the alienor does convey an interest, but the solemnities of contracting in the former case being obtained by fraud, create no obligation; therefore, in the case of land, if the person who comes in by the voluntary conveyance, sells to another for valuable consideration, he fixes the interest in such person as not to be shaken.

As to personal estates, there is a difference between contracts that are negotiable and such as are not; for a man that has obtained a fraudulent contract that is not negotiable, as a bond or covenant, this, as has been observed, creates no obligation in a court of equity; and therefore, though the assignee comes in for value, he obtains nothing; but if a man obtains a negotiable note by fraud, and he actually negotiates it for value, the indorsee of the note shall have his money of the drawer, because he has done a mercantile act, and therefore subjects himself to the mercantile law; for it would be the ruin of all commerce and a great interruption to it, if the original cause and consideration of such notes should be inquired into, and the indorsee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him.

Where a bond was obtained in fraud of a marriage agreement, and though afterwards assigned to a creditor for a just debt, the same was set aside in equity; for if an assignment to creditors would alter the case, it would entirely put an end to all applications for relief in this court; that it would then be only to assign such a bond to just creditors, and all would be safe; but the creditors having no notice of the consideration of giving this note, would not at all help them, for suppose the bond had been a good one, and only part of the money paid, and then it had been assigned,

Prodgers and
Laughan,
Keb. 486.
Sid. 133.

2 Ver. 764.
Wms 496.

Pr. in Ch.
525. 131. 2.
Vide also 2
Ver. 25.
1 Ver. 348.
475. 242.
1 Salk. 158.
Stran. 240.
1 Brown,
Parl. Caf.
57—60.

as if the whole money had been still due upon it, would this affect the obligor? No more, in this case, if the bond was liable to be set aside, whilst it continued in the obligee's hand, his assignment of it will not alter it, though the assignees have no notice of the nature of it; for an assignment of a bond is but an agreement, that the assignee shall have all the money to be recovered thereon: and if none was due, or that the bond was obtained upon unlawful consideration, no assignment can make it better.

As to bargains made with heirs where their fathers are tenants for lives, the rule seems to be this, that if the heir has a maintenance from the father, and should take up goods at extravagant rates, a court of equity will in such cases relieve after the death of the father, and reduce the bargain to the common value of the goods, with an allowance of interest from the time of taking them up; because it is an oppressive bargain, and merely to supply the extravagance and prodigality of the heir.

If a parent or guardian of a minor comes to an agreement with the intended husband upon marriage, that he shall release that part of the money or estate belonging to the infant, such agreement will be set aside in a court of equity, because it is for the sake of the child; and so all brokerage contracts for procuring of marriages with any woman are void, and notwithstanding the bond is coloured with the trouble and pains in making, yet it is a void contract in a court of equity.

A court of equity will relieve an heir against any private agreement with his father, upon the marriage of the heir; as where the father covenants to settle an estate on the marriage, and the heir privately agrees to repay back so much out of it to the father: the heir is under the awe of his father in such case, and not supposed to act freely; for which reason a court of equity relieves against all such private agreements.

CHAPTER THE SECOND.

Of Trusts.

TRUSTS form a very considerable branch of the jurisdiction of the court of Chancery.

It is to be observed then, in the first place, that trusts are the original creatures of the court of Chancery, and were

as ancient as the court itself on the *English* side; and to remedy breaches of trust was one of the chief reasons of the institution of that court. For from the time of the statute of mortmain, ecclesiastical persons used to take lands in trust for themselves, and civil persons were tenants to the estate and liable to the feudal duties. And though this in the first institution answered, yet afterwards, when heirs came in by a long course of descent, they thought it hard to answer feudal duties, and yet to be accountable to the church for the profits. This the rules of the common law would not oblige them to, and therefore it was necessary that a court should be instituted to deal with the corrupt conscience of the party, if he did not answer the trust.

The court of Chancery we before have observed was complained of in its original; but afterwards, during the wars occasioned by the ambition of the two rival houses of *York* and *Lancaster*, the laity found it convenient and politic to put their lands into the hands of trustees, to prevent their possessions from falling a sacrifice to the attainders which were the sure consequence of success on either side: and from thence the court of Chancery came to manage trusts as their own creatures, and from thence they came to establish and adopt those rules which have been settled in the court of Chancery upon the subject of alienations: so that if a man had aliened without a valuable consideration, there was a resulting trust to the feoffor, that always run with the lands, into whatever hands they came without valuable considerations.

This was thought so inconvenient, that the 27 *H. 8. c. 10.* Glib. For.
Rom. 260. commonly called the statute of uses, was created for the express purpose of executing the freehold in him that had the use, or, in other words, the trust. But to evade the intent and obvious operation of this statute, a new mode of conveying was introduced, whereby those uses were again revived and brought to life under the name of trusts, and came under the immediate cognizance and protection of the court of Chancery: for purchasers could not settle their estates to themselves for life, with remainders to their first and other sons, with term created for younger children's portions without the trusts of such terms.

And from hence they came to a resolution, that where an estate was given to A and his heirs, to the use of A and his heirs, in trust for B; that the first use was executed, and the trust remained in B as before the statute: for the common law could not execute the second trust, but rejected it as repugnant and void—but the court of Chancery on the other hand

Simpson and
Turner, Eq.
Ab. 230. p.
r. 383. in
note (A)
Treat. Eq.
54.

hand adopted another mode of proceeding, and established this construction, viz. A was considered as a trustee for B, and therefore A was bound in conscience to perform such trust, for the court of Chancery considered that to be the intent of the conveyance, though the common law considered it as repugnant and void.

Chudleigh's
case, Co.
Rep. 120.
Popham, 70.
Jenk 276.
2 Dan. 177.

Hence also it came to pass, that all trusts which could not be executed by the statute remained under the disposition of the court of Chancery. In settlements therefore the common practice was, to limit the estate to the first and every other son, with trustees to support contingent remainders; and such trustees had right of entry, in order to preserve such contingent remainders till they came *in esse*—for where there were no trustees, if the father had aliened, the contingent remainders were destroyed, because they could not vest at the determination of the particular estate, and therefore the trustees to support contingent remainders were interposed, and if they concurred in the alienation of tenant for life, it was a breach of trust; and if alienation was with notice, the alienee was subject to the trust; if without notice, then such trustees were liable to make compensation out of their own estates.

1 Wms 129.
2 Salk. 620.
Pr. in Ch.
308.

Agreeable to this doctrine it has been determined, that where trustees for preserving contingent remainders join in a conveyance, before the birth of a son, this is a breach of trust, and equity will relieve, for nothing in common justice, sense, and reason, could be a plainer breach of trust, than that those who were appointed trustees to the intent to preserve the estate to the first son, and for that purpose only, should directly, contrary to this trust, join in the destruction of the settlement.

But where there is tenant for life, remainder to the first son, &c. and no trustees to preserve contingent remainders, in such case, if tenant for life by fine or feoffment, destroys the remainder, there being no trustee, there can consequently be no breach of trust; and this being the law, Chancery will not interpose.

1 Wms 704,
5.

Guardians appointed by will, according to the statute of 12 C. 2. c. 24. have no more power than guardians in socage, and are but trustees, and this court will interpose and give relief in cases where such guardians misbehave themselves or give any occasion of suspicion; for the statute, by enabling the father to devise the guardianship of his children, did no more than empower the father by will to chuse a different person from him or her that would have been guardian in socage, and to continue that guardianship to a different period

riod than the guardianship in socage would have continued, viz. until twenty-one instead of fourteen; but that still a guardian appointed under the statute has no more power than a guardian in socage: and as this court can interpose where there is a guardian in socage, it also can in a case of a guardian by statute, both being equally trustees: and this doctrine is grounded upon the general power and jurisdiction which this court holds and assumes over all trusts, and a guardianship has been held to be most plainly a trust. 1 Wms 704, 5.

Lands are devised to trustees to sell for such a price as they should think fit for payment of debts, there is no doubt but this court at the desire of any single creditor might and would interpose and order the estate not to be sold as the trustees should think fit, but for the best price before the master.

It is a rule in this court, that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust; and it is within the reason of that rule, that where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the *cestui que trust* is discharged from being liable for a greater sum lent, or from a plain and great hazard of being so, the trustee ought to be paid. 2 Wms 453, 454.

If a man purchase an estate, and assigns a term to protect it against mesne incumbrances, and afterwards marries and dies, it seems that a court of equity will not permit the heir to set up this term against the wife, though it was not fraudulent in its creation; because the design of the term being only to protect the inheritance, it is against conscience to set up such a term contrary to the design of its creation, and the heir is considered as a trustee to assign down to the wife, and to hand to her, the legal provision she is intitled to by the marriage, and therefore should not be permitted to set up this interest against it. Har. 489.

A dowress shall not have the inheritance of a trust term attending on the inheritance against the purchaser; and this has been clearly settled; but a dowress shall have the benefit of such trust against an heir or devisee, and this is because the husband hath the revocation in him at law, subject to the term; but she cannot of a mortgage in fee, because the whole estate is out of the husband in the mortgagee, and therefore being an equity of redemption merely, and a trust, she is not dowerable out of it. Radnor and Vandelevy. 2 Wms.

These seem to be settled distinctions, though Sir J. Fekyll, in his great argument of *Sutton* and *Banks*, thought the dowress intitled to redeem a mortgage in fee, in order to let in her dower;

dower; and that there was a difference as to a woman being endowed of a trust, whether the trust was created by the husband himself or a stranger; but this opinion does not prevail; and it seems now to be clearly settled, that a woman cannot be endowed of an equity of redemption in fee, or of any other trust estate, where the husband had not nor has the legal right to the estate; and in mortgages in fee, the whole estate being in the mortgagee, and no legal revocation in the husband, it is the same as every other trust for the husband; and the reason why a mortgage for years is redeemable by dowress is, that the whole estate is not out of her husband, but subject to the term, the reversion is in heir at law.

But it has been determined, that a jointress in the quality of a purchaser, shall be permitted to redeem; as where husband before marriage entered into articles to settle lands upon him and the heirs of his body, but died before the settlement was made, the husband's executor was decreed to carry the articles into execution, though the lands were mortgaged to one who had no notice of the articles; and it was further decreed that the wife should retain and hold for life, and that her executors should retain the lands till her money was raised and paid, if she had paid money to redeem the mortgage.

Elliott and Elliot, 2 Ch.

Caf. 231.

Eq. Ab. 381.

2 Ch. Caf.

23.

2 Ver. 17.

2 2 Free-

man, 252.

Where a father purchases lands during the minority of a child^a, in the name of the child, without a declaration of trust in a deed, and takes the profits during the minority, such purchase has been considered in equity as an advancement for the child, because the father is bound to provide for him, and his purchasing in his name shall be construed in a court of equity as fulfilling that obligation, and taking the profits during the minority only as guardian to the son.

But if the father purchases in the name of his son, who is of full age, which by the law is considered as an emancipation out of the power of the father, then if the father takes the profits, or lets leases, or acts as the owner of the estate, the son will be considered as a trustee for the father, because there is the same resulting trust as if the son were a stranger, where the father acts as owner of the estate, since it was purchased with his money.

But if the father had let the son continue the possession from the time of the purchase without acting as owner, there it is an advancement, because the legal estate being in the son, and the father permitting him to act as owner of the estate from the time of the purchase, does as much declare the trust

trust for the advancement of the son, as if it had been declared in express words in the deed.

In the case of *Elliott* and *Elliot* above cited, there is a distinction taken between a purchase in the name of a stranger and of a son; in the former the trust results to him who paid the money, and he may declare the trust at any time; but in the case of a son, the consideration of blood raises an use at common law: and in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain, coherent, and binding evidence, and not by any argument or inference from the father's continuing in possession, and in perception of the profits.

Where there is no clear proof of any trust between the father and the son, the law will never imply a trust, because the natural consideration of blood, and the obligation which lies on the father in conscience to provide for his son, are predominant, and must over-rule all manner of implication. And herein the law of trusts (as it ought to do) agrees with the law of uses, before the statute of *Hen. 8.*; and therefore if before that statute the father had made a feoffment to a stranger, without any consideration, the law raised an use without any implication to himself; but if he made a feoffment to his son, no use did arise to the father by implication, because the blood, which is a sufficient consideration, did fix and settle the estate with the son.

The trustee of a legacy dies before the legacy is paid, that shall not prejudice the legatee; and so if a trustee of land die without heir, though the lord by escheat will have the land at law, yet it will be subject to the trust in equity.

It was said by *Talbot*, Solicitor General, in the case of *Marlow* and *Smith*, that where all the remainders are vested remainders in tail, the trustees may join in making a tenant to the *præcipe*, in order to the suffering a common recovery; but if any remainder is in contingency, the trustees appointed to preserve contingent remainders ought not to join in suffering a recovery to bar any such remainder, as where the remainder was to the use of the body of A (still living), and A had issue C, a son, and D, a daughter, and the trustees join with C in a bargain and sale enrolled, for making a tenant to the *præcipe* to suffer a common recovery, which is suffered accordingly, and C dies, leaving an infant son; now if the son should die without issue in the life-time of A, in such case, D would be heir of A's body. This would be a breach of trust, and

1 P. Wms
111, 112.
Finch, 373.
Ch. Caf.
128.

Pr.Ch. 200,
1. and the
authorities
there cited.

in

Of the Court of Chancery.

in case of a purchase without notice, his title would not be good.

Upon a marriage a settlement was made by a third person to the use of the husband for 99 years, remainder to trustees during the life of the husband, to support contingent remainders, remainder to the wife for life, remainder to the first, &c. son of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband—there was no issue of the marriage, and the remainder in fee being contingent, in regard the limitation to the husband was for years only, and the estate not moving from the husband (for if it had, the remainder limited to the right heirs of the husband would have been the old reversion), the trustee joined to destroy this contingent remainder: on a bill brought by a remote relation, the court refused to punish the trustees, as distinguishing between a voluntary settlement, and one made on a valuable consideration; and the Master of the Rolls said, that if a son had been afterwards born, it would have been a breach of trust; but this remainder to the right heirs of A being a remote limitation, and not within the consideration of the settlement, equity would not punish it as a breach of trust.

1 Wms 358.
Sir Tho.
Tippens's
case.

1 Wms 537.

In a later case it has been held, that where the trustees, against the consent of a father, joined with the first son, the remainder-man in tail, in suffering a common recovery, and yet held to be no breach of trust; for when such remainder was vested in one of full age, a subsequent remainder was not to be regarded, neither was it assets in law or equity.

7 Ann. c.
19. 1 Wms
537.

A court of equity will decree trustees to join for the apparent benefit of a family, and infants being trustees or mortgagees may be compelled to make conveyances by the court of Chancery.

Howard and
Hull, Hil.
1744, MS
Rep.

Note. A devise to trustees and their heirs in trust to sell is deemed equitable assets, in order to make an equal distribution among all the creditors.

per Lord
Keeper
Wright,
Michaelmas
13 W. 3.
Anon.
11 Mod.
560.

If one devise to trustees, and by an express clause therein gives them power to appoint agents to manage the land, and they appoint one then solvent and good, though after he prove insolvent, they shall not answer for him; *secus* if he were not solvent at the time of nomination. But if there were no such direction or power in the will, the trustees are bound to answer for their agents at all events.

2 Eq. Ab.
740.
10 Mod. 21.
1 Ver. 144.

So if a trustee, impowered to put money to interest, lets the money lie by him, he shall be accountable for interest.

A trustee shall not be charged with imaginary values but only as a bailiff, though very supine negligence might indeed

deed charge a trustee with more than he had received ; but the proof against the trustee must be very strong : and it is a hardship upon him that he is allowed nothing for his pains. It has been said likewise, that it was a hard rule to charge a trustee with what he had made, or might have made without his wilful default ; but the reason was, because the court could never yet find where else to fix the measure.

Though an executor or trustee is not empowered or directed to place out money at interest, yet if he makes interest he shall be accountable for it, and so decreed—and this is at this day law. 2 Ver. 548.

If a trustee is directed to place out money on the best security that can be got, with the consent of husband and wife, and he puts it into a banker's hands and takes his note for it, and he becomes a bankrupt, by which the loss happens, the trustee shall be decreed to pay the money out of his own pocket, though no fraud appear, and though the consent of husband and wife be had to it. Rider and Bickerston, MS. Rep.

Where a trustee is insolvent the court of Chancery will compel him to give security before he shall enter upon the trust : so likewise a trustee has been removed from his trust, though much against his will.

Note. It is to be observed that trusts are to be governed by the same laws, and are within the same reason, as legal estates ; and this is a maxim which has obtained universally : it is so in the rules of descent, as in gavelkind and borough English lands ; there is a *possessio fratris* of a trust as well as of a legal estate. The like rule in limitation, and also of barring entails of trusts as of legal estates.

Vid. Sir J. Jekyill's argument in Sutton and Sutton. 2 Wms 645. 1 Wms 81.

Two trustees, in a mortgage for 2000*l.* join in an assignment of the term and in an acquittance for the money, and each receives a moiety : after which, one proves insolvent, and the question was, Whether the other trustee should be chargeable with the whole ? and to prove that each trustee should answer for no more money than he had himself received, was cited *Cro. Car.* 312. and lately in Chancery the case of *Woodcock and Leddal*, who were trustees by Mr. Lister's will, where *Leddal* received all ; and though *Woodcock* joined in a sale to the purchaser, he was not charged : determined that each was answerable for what he received ; but it was said in this case, that if executors join in a sale which there is no necessity for doing, the act of one is the act of the other ; and if one receives and becomes insolvent, the other must account : and so in the case of *Churchill* and *Lady Hopson*, it was held that where two executors join in a receipt, and only one of them actually receives the money,

1 Wms 241.

both

Of the Court of Chancery.

both are chargeable to creditors, but not to legatees; but if two trustees join in a receipt, and one receives the money, the receiving trustee only shall be charged.

Note. There is a difference between joint trustees and executors; executors may act separately if they think fit; but if a trust estate is to be sold, the trustees must both join in conveying, and also in receipts; for otherwise no one will purchase.

CHAPTER THE THIRD.

Of Accident.

BY *accident* is meant where a case is distinguished from others of the like nature by unusual circumstances, for the court of Chancery cannot control the maxims of the common law, because of general inconvenience; but only where the observation of a rule is attended with some unusual and particular inconvenience.

30 Mod.
1 Anon.

The consideration of cases falling under the head of accident, is and must ever be necessarily governed by the peculiar circumstances which govern each particular case, and create the necessity of an application for relief to a court of equity.—From the variety therefore of *accidents* which daily occur, and which the utmost prudence and foresight cannot at all times guard against, inconveniencies daily arise, for which the common law has provided no remedy. In circumstances therefore of peculiar hardship and inconvenience, the court of Chancery will frequently interpose its influence, and by the healing exertion of its authority will afford relief, in cases of accident wherein the party would remain otherwise totally remediless and without redress.

1 Ch. Caf.
77. 78.

If a man lends money to B, and thereupon B and C become bound in an obligation to A; if A loses his bond, yet he may have a remedy in equity against C the surety, though it was said he was not bound at law, but in respect of the lien of the bond—for the bond being for money lent, though the surety had no advantage, yet the obligee had parted with his money; and loss was said to be in this case as good a conclusion for a purchase as a benefit.

1 Ver. 437.

So though the party provides for accidents, Chancery sometimes relieves beyond the provision of the party.

Where A an attorney takes B as his Clerk, and receives 120*l.* and by articles agrees with the father of B to return
60*l.*

60*l.* of the money if he died within the year.—A died within three weeks, the executor of A was decreed to pay back 100 guineas,—so the court, notwithstanding the parties themselves had provided against accidents, and agreed for a certain sum, viz. 60*l.* to be returned in case A died within a twelvemonth, yet decreed 100 guineas to be paid back to the father of B.

So where the defendant being an apothecary, the plaintiff put his son to him as an apprentice, and gave with him a sum of money, and allowed the youth 10*l.* *per annum* for his clothes; the defendant having put away his apprentice after he had lived some time with him, by reason of negligence and misdemeanours laid to his charge, the court decreed the master to refund 30*l.* of the money. Ver. 64;

So where one by articles reciting that he had an estate for two lives in a church lease, covenanted to convey his title to the premises by such a day to *I. S.* as *I. S.* or his counsel should advise. 1 Wms. 61, 62.

It happened that after the articles, and before the time appointed for the conveyance, one of the lives dropt; and the question being upon whom the loss should fall, it was decreed *per* Lord Keeper, That in regard here was no default in the seller in making the conveyance, the loss of the life ought to be borne by the purchaser, in the same manner as if the reversioner had articted to sell the reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should there have had the benefit of it; and in each case in equity, the estate is as conveyed from the time of the articles sealed. 2 Ver. 280;

But his Lordship seemed to think that if *all* the lives had dropt before the execution of the conveyance, it might have been another consideration, for that the money was to be paid upon the conveyance, and no estate being left there could be no conveyance.

1 Wms 346;

So where a former will of land is cancelled by the testator, upon a presumption that a latter will is good and duly executed, which proves not to be so, in such case equity will relieve under the head of accident.

Anciently indeed, forfeitures of penalties and conditions were not here relieved, though the non-performance of the condition or of the act creating the penalty, was to be attributed solely to accident, and not to the wilful default, negligence, or other misconduct of the party; but now it is every day's practice to relieve in such cases, without such limitation, where the damage is under the penalty, and the advantage accruing to the person taking benefit of

MS. Cal. in
Chan. Lord
Bath v.
the
Sherwin.

Of the Court of Chancery.

the condition : and this is founded upon an unerring rule of justice, for there is no injury to the person unto whom the condition or penalty is forfeited, because he is in no worse case, than if the condition had been performed.

1 Roll. Ab.
376.
Ibid. 373.

It has been held that a court of equity could not decree against a maxim of law, and therefore it has been adjudged that if an obligee lost his bond, he was without remedy; so where the party became remediless by his own acts, as by paying money without an acquittance: but these resolutions and many others of the like kind of the common law courts, to be found in the books, have been long since exploded, and it is now the daily practice of courts of equity to relieve in such cases, and in all others falling under the head of accident, though such cases may militate against the maxims of the common law.

CHAPTER THE FOURTH.

Of Specific Performances of Agreements.

AT the common law every covenant and agreement was but personal, where there was no proper conveyance to transfer the right of the thing itself, and being only a personal covenant, where it was broken, the covenantee could only recover damages.—Thus if a man covenanted to settle his lands upon marriage, or to convey them for a valuable consideration, the covenantee could only recover damages at law for the breach of such covenant, but had no remedy for the settlement of the thing itself: this was thought not a sufficient satisfaction, because the party who had entered into the covenant was obliged in conscience not only to make compensation for the breach where he could not perform, but also actually to perform where it was in his power so to do; and therefore a court of equity deals with the corrupt conscience of the party, where he refuses to perform what is in his power.

For. Rom.
236.

Prec. Chan.
208. Eq.
Abrid. 19.
2 Eq. Abrid.
47. p. 15. in
margin.

If a man by his answer owns to have made a complete agreement, though such agreement be not in writing, yet a court of equity will carry it into execution: for the statute of frauds and perjuries was designed to prevent fraudulent and surreptitious agreements, and not to vacate bargains that were fairly and honestly made; for in these cases, the party is bound in a court of equity, not to take advantage
of

of the want of any solemnities, whether imposed by common or statute law; but if the defendant insists in his answer, either that the bargain was fraudulent or not complete, but merely a communication for the term to be further settled, then he may plead the statute, and it shall be allowed; for in the first case, where he acknowledges the bargain to be complete and not fraudulent, he ought to waive the benefit of the statute: for no honest man should insist on the want of solemnities, where he has made a fair bargain;—and besides, where he allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury, because he himself in his answer has owned the agreement, and taken away the necessity of proving it; but where he insists, either that the bargain is not made, or fraudulently made, then he may insist upon the statute.

Pr. Chan.
402. 2 Ch.
Rep. 284.

If an agreement be by parol, and not signed by the parties or some one lawfully authorised by them, if such agreement be not confessed, as is said, in the answer, it cannot be carried into execution; but if it be carried into execution by one of the parties, and such execution be accepted of by the other, he who accepts it must perform his part.—As if A sells his estate to B by parol for 1000*l.* if A accepts the 1000*l.* or any considerable part of it, he must convey his estate to B; for otherwise it is a fraud to accept the money of B and not convey the estate. And it could never be the intention of the statute (which was to hinder bargains from being sworn upon them that they never made), that men should take advantage of not completing bargains which they had made, and which were actually performed to them; for where there is a performance, the evidence of the bargain does not merely lie upon the words, but upon the fact performed, of which they have reaped the advantage; and it is unconscionable that the party who has received the advantage of the verbal contract, should be admitted to say such contract was never made; for the law must be construed according to natural equity, and not to execute a fraud; and the person that receives money, and does not convey, is plainly guilty of a fraud, and therefore must not be permitted to say that he did not sign, where he has received all the benefit he could have had by such signing; for that were to construe the statute against frauds, so as to protect fraud and not suppress it.

Eq. Abrid.
23. 2 Ch.
Cas. 135.

2 Vez. 377.

Note. A written agreement not under seal, may be discharged by parol; but a written agreement under seal, which is a specialty, cannot be discharged by parol.

Eq. Abrid.
21. 2 Chan.
164.

A sells houses to B for 2000*l.* and A draws up a note of the agreement in writing, which B signs, but A does not. A brings his bill against B, to compel him to a specific execution of this agreement, and it was decreed for A; for his drawing up a note of the agreement in his own hand, and procuring B to sign it on his part, was the signing of B not only for himself, but as authorised by A to close the agreement. And therefore if B had come into a court of equity against A, the court would have decreed the agreement against A.

But it is to be observed, that the plaintiff who exhibits his bill upon the ground of having performed the agreement on his part, ought to shew, that he has performed all that is to be done on his part, or that he is ready to do it; for where any part (which he should have performed) is become impossible to be performed at the time of exhibiting his bill, there he cannot have any specific execution, because he cannot specifically perform his own part of the agreement.

Finch, 445.
Lord
Fevertham
v. Waters.
2 Freeman,

35.
Skin, 287.

Gilbert's
Eq. Rep. 70.
Prec. Chan.
312. 2 Ver.
448.

But if a man has performed so much of his part of the agreement as he is not *in statu quo*, and is not in default for not performing the residue, then he shall have a specific execution from the other party: as if A has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue, lands of such value free from incumbrances, and he sells part of his land to disincumber, and is going on to disincumber and settle the rest; there if the wife dies without issue, before the settlement be actually made, yet he shall have the portion, because he cannot be in the same condition, having sold part of his land, and there was no default in him, since he was going on to disincumber and settle the rest; therefore the accident of the death of his wife doth not alter his right to his wife's portion.

2 Freeman,
217.

Seld. Cas. in
Chan. 63.

Where no action at law will lie to recover damages, there equity will not execute the agreement *in specie*, for equity will never make that, a good agreement, which is not so by law; but where damages are to be recovered at law for the breach of a covenant, equity will compel a specific execution of such act, for the not doing of which the law gives damages; and that for this reason, as an adequate compensation is to be made on the covenant, the *quantum* of damages may be very uncertain; and therefore, to prevent that uncertainty, equity will enforce a specific execution of the thing; for it is a certain clear rule of equity, that a specific performance shall never be compelled, for the not doing of which the law would not give damages.

But

But it is to be observed, that where equity executes an agreement *in specie*, it must be such an agreement as is fairly made, without any fraud or circumvention; for the rule is, that agreements and contracts must be on good considerations, or mutual recompence; for a court of equity is not bound to decree a specific execution of agreements where they appear to be unreasonable, or founded in fraud.

Grounds
and Rudi-
ments of
Law and
Equity, p.
18.
Prec. Chan.
538.

Equity will relieve not only against fraud and circumvention in an agreement, but also against an hardship:—in the first, it will set the agreement aside; and in the second, it will not carry it into execution.

Bunb. 111.
10 Mod.
506.

If on any treaty the agreement is not reduced into writing, nor proposed to be reduced into writing, nor executed in part, there the statute of frauds is in the way; but if the agreement was proposed to be reduced into writing, and prevented by fraud or practice of the other party, a court of equity will interpose and give relief; as where instructions are given and preparations made for the drawing of a marriage settlement, and before the completing of it, the woman is drawn by the assurances and promises of the man to perform it, and after to marry him.

Prec in Ch.
526.
2 Will. 65.
2 Atk. 98.
3 Atk. 388.
1 Will. 618.
1 Vef. 297.

So where a man treated to lend money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeazance from the mortgagee, and after the mortgagee had got the conveyance he refused to execute the defeazance, yet my Lord *Nottingham* decreed it against him on the fraud after the statute.

Prec. Chan.
526.

We may conclude this head with observing, that equity, in the consideration of cases which fall under the head of agreements, will determine what agreements ought to be performed *in specie*, and distinguish them from those which have no claim upon the equity of the court.

It will determine what acts shall be taken to be done in pursuance of, and shall go in satisfaction of the whole or part of an agreement, and in what cases a covenant is a specific lien upon the real, and in what upon the personal. It will relieve in cases of variance between the articles made previous to marriage, and a settlement made subsequent, and will determine in what instances money agreed to be laid out in land, shall be paid to the heir, and in what instances not; what agreements do come within the meaning of the statute of frauds, and what within the exceptions of it.

It will distinguish between reasonable and unreasonable agreements; and will relieve in the one case, and leave the party to his remedy at law, in the other.

CHAPTER THE FIFTH.

Of Portions.

Tevnham.
w. Well,
2 Vek. 207.

THE head of portions, or any other provision for children, admits of a greater variety of determinations here, and of judgments on circumstances, than perhaps any other head, because a greater latitude is exercised by the court in determinations of portions, and all the consequences of them, than is to be applied to any other cases, and there is no arguing from the case of portions to any other.

2 Freeman,
93. Eq.
Abrid. 267.
Ver. 204.
321. 2 Ch.
Rep. 286.

If a man limits a term to raise younger children's portions, to be paid at the age of twenty-one years, or the day of marriage, and there are younger children born, and they die before twenty-one, or day of marriage, the portions shall sink for the benefit of the persons who are to take the remainders by the settlement, because the intention of the settlement is, that the eldest sons who are in the remainder by such settlements, should take it in the most beneficial manner that may be; where such provisions are not necessary to be raised, when the child dies who is to be provided for, and this is following the intention of the settlement as near as possible, that all the parts of the family may be provided for out of the estate in the best manner.

Prece. Chan.
290.

So it is where a term is limited after the decease of the father, to pay younger children's fortunes within one year after the commencement of the term, and interest to them in the mean time for their maintenance; there if one of the children dies within the year, her fortune shall sink for the benefit of the heir at law, because this also is not to be raised by the intention of the settlement, till the time therein limited.

1 Ver. 204.

In general it may be observed, that since the case of *Parwlett and Parwlett*, (the rule laid down in which has been mostly adhered to,) the difference has always been taken where portions are to be paid out of the personal estate, and where they are to be raised out of the real estate, and so execute a charge upon the inheritance of the heir; for in such case, if the party for whom it is provided, dies before payment, it shall sink into the inheritance, for the benefit of the heir, and his estate shall not be loaded for the benefit of strangers only.

But

But where a portion was devised to a daughter out of a real and personal estate, to be paid at twenty-one, without saying, or marriage, and the daughter marries and dies before twenty-one, leaving a child, yet the court held and decreed, that by reason of the marriage it was then due; marriage being the cause of portions: and the Lord Chancellor said, the reasons of all the cases go that way; for they go upon this, that there being no marriage, that did not happen which was the cause of the portion.

So also if in a marriage settlement there be a term to raise one hundred pounds a-piece for younger children, and there be no time limited for the payment, there it is due and payable to such children as soon as ever they are born; and therefore if they die before twenty-one, it shall go to their executors or administrators, because if it had been raised immediately, the money would have gone to their executors or administrators; and where it ought to have been raised immediately, it is looked upon, in a court of equity, according to the rule of the civil law, to be raised, for *qui habet remedium ad rem ipsam rem videtur habere*.

It was strongly urged in this last case, that the portions should extinguish for the benefit of the heir: and the case of *Pawlett* and *Pawlett*, first decreed by the Lord Keeper *North*, and afterwards confirmed upon an appeal to the Lords, where the difference was taken between a legacy out of a personal estate, and a portion to be raised out of the rents and profits of lands, was strongly insisted upon as a case in point, saving that in that case the portion was made payable at marriage, or twenty-one years, and in this case no time is appointed, but the same to be raised out of rents and profits.

But the Lord Chancellor said, he knew not what reasons the Lords might go upon in the case of *Pawlett* and *Pawlett*, but he was to make decrees according to his conscience, and every case was to stand upon its own bottom; that he thought the case before him very plain and without difficulty; it was clearly an interest vested in the daughter, and ought therefore to go over to her executors, and the rather, because there was no time appointed for the payment.

So where one devised 1000*l.* to his daughter for her portion, charged upon a real estate and payable at twenty-one, and the daughter dies before twenty-one, the portion shall sink into the land; otherwise if no time had been limited for the payment of the portion, for in that case it will go to the executors of the daughter, and there is no difference whether the portion is secured by a settlement or a will, if

Prec. Chan.

109. 3

Will. 175.

1 Ver. 204.

321. 2 Vent.

366. 2 Ver.

424. 617.

416. 1 Ver.

140. 213.

196. 267.

1 Will.

401. 2. 2

Will. 276.

3 Will. 20.

Forrest. 193.

2 Ver. 72.

Eq. Abrid.

268.

Ibid. 348.

208.

Ibid. 92.

secured out of a real estate, and the party dies before it is payable. In either case it sinks into the land: and the court said, that the judgment in Lord *Pawlett's* case governed this, for it appeared that the intention of the testator was, that it should be for a portion, and it is expressly called a portion in the will, and then it is no personal legacy, but money to be raised out of the rents and profits of land: and the case of the Earl *Rivers* and the Earl of *Derby* differs from this: in that case, there was no time limited for the payment of the money, but here the payment is expressly to be at twenty-one years, or marriage.

2 Ver. 72.
2 Will. 604.
3 Will. 171.
3 Will. 119,
120.

Note. This seems to be the settled rule, that where no term is limited for the payment of portions charged upon lands, and the parties claiming the same are of tender years, though the right to the portions vest in such infant parties, yet they are not to be raised by sale or mortgage, but by the rents and profits of the lands so charged.

2 Will. 604.

Preced. in Ch.
394. Gilb.
Eq. Rep. 89.
Chan. Cal.
173. 3 Ch.
Rep. 39.

Where lands are settled and devised in order to raise money out of the rents and profits of such lands, for the payment of portions at certain and fixed days, or for the payment of debts; here, though there be no clause of empowering the trustees to dispose of the land for the purposes aforesaid by sale or mortgage, yet if the portions cannot be raised out of the rents and profits so as to be paid at the times appointed, nor the rents and profits answer the payment of the debts within a reasonable and convenient time; the trustees may sell or mortgage the lands in order to fulfil the trust; because it is the design of the trust, that the debts and portions should be settled out of the lands, and if they cannot be satisfied by the perception of the annual profits, they must be satisfied by the profits of the fee simple, and this must appear by an account taken of the debts and portions to be satisfied out of the estate, and likewise of the annual profits of such estate.

2 Mod. Caf.
12. Gilb.
Eq. Rep.
168. 2 Will.
Rep. 222.
1 Strange,
596.
Lucas, 463.

But if such payments are to be made out of the annual profits or rents only, there such payments must be made as they can without sale or mortgage, because the court cannot enlarge the dispositions that persons make of their estates further than the intent of such conveyances; so likewise if the payment had been made out of the rents only, the lands could not have been sold by the trustees, because the trustees were confined to the yearly income of the lands.

If a father limits or devises portions to his daughters or younger children, payable at their respective ages of twenty-one years, or any other certain time, without making any other provision for their maintenance in the mean time, and dies;

in

in this case, they shall have interest for their portions from his death till paid; because the father, if he had lived, was obliged by the law of God and nature to have provided for them; but if such portions had been provided in such manner by a stranger, then they should not have carried interest in the mean time for the children's maintenance, because it was mere bounty in the stranger, and he was under no such obligation as the father was to provide for them, and therefore his provision shall be carried no farther than he has appointed it.

Eq. Abridg.
301. p. 2.
Prec. Chan.
337.

If land is charged with portions, the heir cannot give personal security for them in discharge of the land; nor shall he be allowed to pay before the time limited by the settlement, viz. full age, or marriage.

Ver. 338.

It was laid down as a general rule, that if there be a term for years, or other estate limited to trustees, for raising portions for daughters, payable at a certain time, which is become a vested interest, they shall not stay till the death of the father and mother, unless some intention appears to postpone it; and if there does, the court will always take notice of such intention, and postpone it accordingly; and the court will lay hold of very small grounds that speak the intent of the parties to hinder the raising the portions in the life-time of the father and mother.

Corbett v.
Maidwell,
2 Ver. 440.

If a reversionary term or estate be limited to trustees to raise portions at a certain time, though when that time comes the portions must be raised, unless in the direction of the trust term the intention of the parties appears to the contrary; yet it has been said that the court has gone rather too far in sales of reversions for raising portions for daughters, even against the intention of settlements; Lord Chancellor Macclesfield, in the case of *Sandys and Sandys*, declares the selling or mortgaging reversions to be a great hardship, being in effect to ruin a family for the raising of daughters' portions, and therefore he would not go one step further than precedents forced him.

So, agreeable to this doctrine, that where, upon a marriage settlement, lands are limited to the use of husband and wife for their lives, remainder to their first and every other son in tail, and in default of issue male of the marriage to trustees in trust, to raise portions for daughters payable at twenty-one, or marriage, which shall first happen, and out of the profits to pay 100*l.* *per annum* for maintenance, the first payment of the maintenance, to commence after the estate of the trustees shall have come into possession—husband dies without issue male, leaving a daughter who is jointured

T. Jones's
Rep. 201.
Salk. 159.
2 Ver. 458.
2 Ver. 460.

2 Will. 484.

Of the Court of Chancery.

tured in the premises ; it was determined, that the portion should not be raised in the mother's life-time, because the maintenance, which is naturally to precede the portion, is not to be paid till the trustees are in possession.

1 P. Will.
448. and the
reasons and
authorities
there cited.

So also where a term was created for raising daughters' portions, commencing after the death of the father and mother, upon trust, to raise the portions from and after the commencement of the term ;—father dies, leaving a daughter, the portion was decreed to be vested, but not raiseable during the life of the mother.

CHAPTER THE SIXTH.

Of Powers.

Gilb. For.
Rom. 301.
Rep. Temp.
Finch, 237.
3 Keb. 551.
2 Freem.
308. Chan.
Cas. 264.

POWERS in any settlement are a reservation of so much dominion over the estate itself which is settled or conveyed. This power being a reservation of so much dominion over the estate, if the party to whom the power is reserved should convey the estate to any good purposes, as for payment of debts, or for raising younger children's fortunes, though the circumstances required by the power are not complied with, yet a court of equity will supply them, because the party having dominion over the estate, he may do, as far as his power goes, that which every owner may do with his estate ; indeed he cannot go beyond the power to charge it further, because beyond the power the estate is settled, and therefore so far out of his power ; but as far as the compass and extent of his power reaches, so far a court of equity will supply the defect of all circumstances ; because in a court of equity, the circumstances are looked upon as guards for the better execution of that power, and to secure the party that has it from any circumvention or surprise, and a court of equity will see that the party is not circumvented or surprised in the execution of such power. And therefore all circumstances that guard it are in that court unnecessary, where there are no other persons concerned but those that claim under the power, and those that claim under the settlement ; because those that claim under the settlement do likewise claim under the power, and therefore they have the full benefit of the settlement which they contracted for, though the power be executed upon them.

There-

Therefore if the power be to be executed for the payment of debts in the presence of three credible witnesses, and it is executed for the payment of debts in the presence but of two, if there be no conveyance of the land itself, or no person appointed for the execution of the power, there a court of equity will supply it by their decree, and order it to be executed by the persons interested in the settlement, because they all claim under that power; but if the power be to be executed by a will in writing, there it must have the circumstances required by the statute of frauds and perjuries to a will in writing, that passes lands, because otherwise it is no will, and therefore cannot charge the lands as a will, since such wills are made void by the statute, and a court of equity cannot break in upon those solemnities.

Montague v. Bath, Sel. Chan. Caf. 55. Eq. Ab. 265. p. 3. Lev. 303. Sir T. Jon. 25. Chan. Rep. 283.

Tenant for ninety-nine years, if he so long live, with a power of charging the premises with a sum of money, joins in suffering a recovery, and declares new uses, without reserving a power of charging the premises with the money; this extinguishes his power of charging.

Will. 773.

So where one makes a settlement with a power, that he might by deed or writing under his hand and seal revoke the uses thereof and limit new uses by the same or any other deed; he revoked the settlement, and limited new uses by the same deed, without annexing any new power of revocation, and by another deed he revoked the last uses, and again declared other uses; and it was held, that he in the first deed having annexed a power of revoking the uses, but as he had not annexed any power of revocation to the new uses, that his power was executed by the first deed and at an end, and that by consequence the revocation afterwards was without authority and void, and consequently the uses declared upon the first revocation must stand; and this case was affirmed in the House of Peers, and agreed to be entirely a new case, and was very elaborately argued on both sides.

Hele v. Bond, Prec. Chan. 474. 1 Will. 101, 2. 2 Ver.

Note. This case is law. The first execution of the power was here over the whole estate.

530. 1 Vent. 198, 9.

So also where a man makes a feoffment without power of revocation, when he has executed the power he cannot limit new uses, but if it had been with power to revoke and limit new uses, with power of revocation annexed to the new uses, which he afterwards revokes, he may again limit new uses (so in infinitum, taking care to reserve new powers of revocation).—But in a late case, where a man had power to limit A and B to such uses, and he by deed limits A to such uses, and afterwards limits B to other uses; and it was

Zouch v. d.m. Woolston v. Woolston and others, held 2 Burr. 1136.

held that the second appointment was good, and was different from the case of *Hele and Bond*, as in that case the first deed executed the power over the whole estate, and so nothing remained to be executed; but an execution of the power in A would not prevent at any other time an execution of it in B; and it was held, that a person who had such power of revocation may revoke part at one time and part at another, but not the same part twice over, without reserving a new power of revocation. — And *note*, These kinds of power have exactly the same construction in courts of law as of equity, being part of the old dominion which the owner of the estate reserves to himself out of his own property.

Where there is a defective execution of a power, be it either for the payment of debts or provision for a wife or children unprovided for, equity will supply the defect. The difference is, between a non-execution and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child; but equity will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party, whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

2 P. Will.
489.

Where a power is given to be executed by a deed or will or instrument in nature of a will; if the power is executed by will, it is always revocable to the testator's death, from the nature of the instrument.

2 Vesey, 61.

Note. A will to pass lands by virtue of a power, must be executed according to the statute of frauds.

There is a vast difference between executing a power by deed, and a power by will; every appointee under a power must take according to the nature of the instrument executing that power; if done by will it must always have the construction of a will, (*viz.*) it is always revocable, and may be executed fifty times without reserving new powers of revocation, as the act is never complete till the testator's death; and if any of the persons claiming under such appointment should die in the life-time of the testator, his interest would lapse and not be transmissible to his representatives, as nothing vested in the legatee himself; whereas in a deed it is otherwise, and it vests in such person's representatives, though he died in the life-time of the person executing

2 Ves. 61.
640.

that

that power, because the act by deed was complete, and could not be revoked without a power for that purpose.

A gives 1000*l.* to be laid out at interest and paid to his wife for life, and then to be disposed unto and among such children begotten between them, and in such proportion as his said wife should by deed or will appoint; and Sir T. Clerk, Master of the Rolls, said, that the wife was confined in her object, viz. the children, but left to her discretion to apportion it between the children; and every child must have some part, but as she pleased.

2 Vef. 61.
2 Vef. 640.
2 Atk. 68.

If there be tenant for life with remainder in tail, and tenant for life has a power of making leases under certain terms and restrictions; if the tenant for life makes leases for valuable consideration, as for money *bona fide* paid, or for valuable rent reserved, or as a provision for younger children; in such case, if all the circumstances of the power are not pursued, a court of equity will relieve, as it does where any other defective conveyance is made; for since the tenant's defective execution of a power for life has a dominion *in tanto* over the remainder; the not executing the conveyance according to the exact terms of the power, is no more than a defective conveyance; and when a defective conveyance is made upon a good and valuable consideration, a court of equity always does relieve.

3 Ch. Rep.
Nelf. Chan.
Rep. Eq.
Abrid. 342.
Ch. Caf. 159.
Srl. Ch.
Caf. 55.

But if such person makes a voluntary lease, if it be not pursuant to the power, a court of equity will not relieve, because the conveyance being defective, and upon no valuable consideration, a court of equity cannot set it up against the person who has the legal estate in him; for he that claims under the power, can have no better title in a court of equity than he has at law, since there is no valuable consideration to set it up in a court of equity.

Ibid.

But there are two cases in which a court of equity will relieve the person, who comes in under a voluntary deed by such power.

The first is, where any of the terms of the power become impossible by accident to be executed; for a court of equity relieves against all manner of accidents, since it is unconscionable for the remainder-man to take advantage of them; therefore if a man makes a conveyance with a power of revocation, in the presence of four privy counsellors, and he is sent by the King to *Jamaica*, where that circumstance becomes impossible, there equity will allow him to revoke without it.

2 Ch. Rep.
417.

Secondly, where the remainder-man gets the deed into his possession, and will not allow the tenant for life to have

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Of the Court of Chancery.

a right of it, there the tenant for life may execute conveyances; and though he does not pursue the terms of the power, yet a court of equity will relieve, because the remainder-man shall not take advantage of his own wrong, by withholding from the tenant for life the right of his own power.

If a feoffment in fee be made to the use of A for life, remainder to B in tail, with a power to A to make leases for twenty-one years, or three lives, reserving rent: if A makes leases, these leases derive their essence out of the feoffment, and after they are made, do in point of time precede all the other estates limited by the feoffment, and the rent thereon reserved shall go with the reversion or remainder thereby limited as a rent properly so called, and not a sum in gross; and those in remainder or reversion may distrain and bring debt, as if they were seised in fee and had made such leases; for since the same deed that limits the estate to A and B gives such power as aforesaid, if such leases were to determine on A's death, the power would be idle, for without it he might have made such leases, but the power being to make leases, which may endure to a much longer term than the life of A, must be from the same root as A's own estate.

But these leases can only be made by virtue of such power upon estates executed by transmutation of possession, as feoffment, fine, recovery, lease and release; for if one bargains and sells land to another by indenture inrolled for the life of the bargainee, with power for the bargainee to make leases for three lives or twenty-one years, this is of no effect to give him such power, for here is no transmutation of possession at law, but only an use raised by virtue of the consideration, to which the statute of uses immediately after the inrolment carries possession according to the use, but for no residue of the estate: that continues wholly in the bargainor as it was before, and there the persons who are the lessees being unknown, no consideration can arise from them to the bargainor, and by consequence no other use can be drawn out of him; and if the use does not arise at the time of the bargain and sale, it never can arise after, because when the deed is once perfect, its operation as to creating any further interest is then at an end, and consequently no leases can be made under such power for want of a consideration to raise an use to the lessees.

So if one covenants to stand seised to the use of himself for life, remainder to his wife or children, with power for the covenantor to make leases for divers good causes and
consi-

considerations, for life or years, this power is so perfectly void, that he cannot by virtue thereof make leases to his own sons and daughters, because such general considerations raise no use : since such leases are to arise and take effect from the estate of the covenantor, there must be a consideration to raise an use ; and if there is no consideration to raise the use at the time of the covenant, it can never arise after, because the further operation of the deed ceases ; but upon feoffment, fine, recovery, lease and release, the estate is executed presently, and a change in the possession immediately made, there no consideration is required to raise the uses, and then by virtue of the power which is created at the same time with the conveyance itself, the lease may be made at any time after.

CHAPTER THE SEVENTH.

Of Wills, Devises, Legacies, Executors, and Administrators.

THE several branches which are intended to be the subject of this chapter being intimately connected, it will be convenient to consider them together ; and taken collectively they form by far the most extensive, if not the most important head of relief which falls within the cognizance of the equitable jurisdiction of the court of Chancery.

Where there are bond creditors and creditors by simple contract, the bond creditors may, if they please, sweep away all the personal assets ; for a court of equity cannot narrow their security : but if the simple contract creditors exhibit their bill against the heir and executors, and also the bond creditors, for the purpose of having an assignment of their bonds, a court of equity will order the bonds to be assigned to a trustee for the use of the simple contract creditors, who may sue the heir at law upon the bonds, in order to recover the value of the money due on the bonds to satisfy the simple contract creditors.

As to legatees there is a distinction ; for if the legacy be upon meritorious consideration, as in satisfaction of a debt, or as provision for younger children or grand-children, there equity will marshal the assets in the same manner for such legatees, as for simple contract creditors : and it hath been

said,

1 Prec. in
Chan. 2.

3 Ch. Rep.
89. 2 Eq.
Ab. 43. p.
2. 465. p. 4.
2 Freeman,
34. 52. 141.
181.

said, that if such marshalling the assets would totally destroy or eat up the estate of the heir, that equity in favour of the heir will apportion the lands so as to give both the heir and legatee a share, which must be in this proportion, (viz.) that the heir must have as much as all the legatees taken together; for since he is not disinherited by the will, the value of what descends to him must be looked upon as his proportion; for the leaving it to descend, was as much a designed provision for the eldest son as the express devise was for the younger children, and therefore he must abate proportionably out of his provision, in the same manner as each of the younger children are to abate out of their respective provisions, there not being sufficient assets to answer.

But if the legatees were volunteers or collateral relations, for whom the testator was not obliged by the law of God and nature to provide, there is no marshalling the assets in favour of such legatees; for a court of equity never interposes but in favour of persons who have a meritorious consideration.

A dies indebted by bond, and by his will gives a legacy of 500*l.* and devises his lands in fee to I. S. leaving a personal estate sufficient only to pay the bond debt; it was determined, that the legatee should not stand in the place of the bond creditor to charge the land, in regard the land is specifically devised, *secus* of the land descended to the heir: and the Lord Chancellor said, that though equity will marshal assets in favour of a legatee, as well as of a simple contract creditor, yet every devisee of land is as a specific legatee, and shall not be broken in upon, or made to contribute towards a pecuniary legacy.—That it was a rule if one gives a specific legacy of a horse, or a diamond, and also a pecuniary legacy of 500*l.* to B, and there are not assets to pay both, still the specific legatee shall be preferred, and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be *pro tanto*, to make such specific legatee buy his legacy against the manifest intention of the testator; and that if a specific personal legatee shall not contribute towards a pecuniary legacy, much less shall a specific devisee of lands.

1 P. Will.
68c. Vid.
also 203. 4.
in the same
book.

If a man devises land for payment of his debts and legacies, and the surplus to his heir, the personal estate shall be first applied in aid of the heir, as well for the payment of the legacies as of debts; and though the residue of the personal estate is given to the executors.

Ch. Ca. 207.
2 Vent. 389.

The rule of the court, as to marshalling assets, and directing simple contract creditors to stand in the place of specialty

specialty creditors to receive satisfaction *protanto*, is a very just and beneficial rule, and ought to be adhered to, and the court leans and endeavours to bring creditors within that rule, and extends it that all the creditors may receive satisfaction; but the court cannot extend this relief to creditors further than the nature of the contract will support it, therefore it must be a specialty creditor of the person whose assets are in question, such as might have remedy against both real and personal, or either of the debtor deceased; it not being every specialty creditor, in whose place the simple contract creditors can come to affect the real assets, viz. where the specialty creditor himself cannot affect the assets, as where the heirs are not bound.

1 Ves. 312.

Where lands are appropriated for the payment of debts and legacies, either by the party in his lifetime, or by will, the rule is, that such debts are to be paid *pari passu*, bond creditors and simple contract creditors equally; and if one of the trustees, who is to sell the land, is a bond creditor, yet he has no preference to the rest; and the reason is, because the lands not being originally a security for the payment of those debts, they became so by appointment of the owner; and the owner having appointed them to the payment of *all his debts*, no one debt which is upon a just and equitable consideration can be preferred before the other, and this is as well where the conveyance is by act executed in the person's lifetime, as by devise; for the devisee was not liable to the bond creditor, though the heir was, but the estate by the devise would be totally exempt from creditors, if the trust had not been annexed to it; and the trustee in this case having no lien upon the estate by his bond, must take it under the trust which brings in such trustee and bond creditor *in pari passu* with the rest; and this is as well since the statute of 3 and 4 W. and M. c. 14. as before; for though that statute provides against the voluntary disposition of lands, to the disappointment of bond creditors who have a lien upon the heir, and subjects the devise to the payment of the bond debts; yet there is an exception in the statute as to the disposition of lands for the payment of debts, and children's portions, which the testator by contract in his lifetime was obliged to pay; and therefore simple contract creditors are in equal degree with bond creditors, as they were before the making of that statute.

2 Chan. Caf.

54.

But if land be devised to executors to be sold, or a power devised to them to sell, in that case, the money arising from the sale is assets, and shall be distributed according to a course of administration, because it being the intention of

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the testator to make the lands personal assets, equity must follow the intention of the testator, and distribute them in a course of administration.

It may be material to observe here, that before the statute of fraudulent devises, 3 and 4 *W. and M. c. 14.* the devisee of an estate was not obliged to pay specialty debts of the testator, because the descent was broke, and that also was the rule of equity before the statute, unless there were some particular circumstances in the case; but this court had been often attempting before the statute to make a devisee liable to specialty debts, but were not able to come at it, which
 2 Atk. 432. was the occasion of the statute.

And with respect to the heir before the statute, he would have had in this court the benefit of the personal estate in ease of the real; but if there was no personal, the heir could have had no relief, not so much as a contribution from the devisee.
 Ibid.

By force of this statute, the devisee is made liable at law, and the action must be brought jointly against the heir and devisee. So also in this court since the statute, where one seised of lands in fee, binds himself and his heirs in a bond, and devises his lands to *I. S.* in fee, and dies; it has been determined, that in a bill brought by the obligee in the bond, to subject the devisee to the payment of debts, the devisor's heir must be made a party.—In this case the court said, It is the act of parliament which made this assets in the devisor's hands, and *that* requires the heir to be made a defendant; you must follow the remedy therein prescribed, and this bill in equity is as an action at law; otherwise if there were no heir, and perhaps it might be otherwise too if the bill had charged that the plaintiff had made inquiry and could find or discover no heir.
 2 P. Will.
 100.

The rule in equity is, that to satisfy a specialty debt, personal assets must be first applied, and if deficient the real assets descended. And where a bill was to have satisfaction out of assets descended and devised, Lord *Talbot* directed, if the personal estate was not sufficient, an account was to be taken of assets descended, and if those were deficient, then of assets devised; which shews his opinion as to the order in which assets were to be marshalled.
 1 Atk. 434.
 Pitt and Ray,
 Caf. Temp.
 L. Talbot.

If a man mortgages his estate and dies, the heir of the mortgager may demand the benefit of the personal estate after all debts and legacies paid in exoneration of this mortgage, though there was an express devise of the *residuum* to the executor; and the reason is, because the personal estate is the fund for payment of all debts, and the mortgage money

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is a debt, whether there be a covenant for the payment of it in the mortgage deed or not; but if there be an express clause to exempt the personal estate from such debt, or words tantamount, there the load lies upon the heir, because it is the will of him who has the dominion over both estates, that the real estates should be charged in such manner.

Prec. Chan.
2 Salk. 449.
2 Ch. Rep.
273.

If a man devises lands for the payment of his debts and legacies, and devises his personal estate to his executor, yet such personal estate shall go in exoneration of the real estate, because the remainder after the debts and legacies goes to the heir, and the personal estate is the natural fund for the payment of the debts and legacies: and in this case the devise to the executor seems to be no more than surplusage, since the personal estate would have gone to him without such devise.

2 Ver. 302—
309. 2 Eq.
Abrid. 494.
504.

There is a benefit one way to a specific legacy, which is, that it shall not contribute; so there is a hazard the other way, for instance, if such specific legacy (being a lease) be evicted, or being goods (be lost or burnt), in all these cases such specific legatees shall have no contribution from the other legatees, and therefore shall pay no contribution towards them.

1 P. Will.
541.

Executor or administrator may prefer his own debt, and pay or retain that to himself before creditors in equal degree with himself; but an executor or administrator may not prefer his own debt before that of another executor or administrator being in equal degree; as where A and B, two bond creditors, took out administration jointly, A got into his hands the whole of the effects, and retained them for his own debt against B; and whether he could retain was the question. Sir J. Jekyll—The rule of the court in cases of retention is, that unless the party can shew a legal right to retain, the court never gives it him; at law no doubt executors or administrators may retain against creditors of equal degree, and the reason is, if such retention was not allowed, the executor, in case of a deficiency of assets, would have no way of obtaining satisfaction for his debt, as he cannot sue himself.

But one executor or administrator cannot sue the other at law, for they are considered as one person, and the receipt of one is the receipt of the other, and the receipt of one must accrue for the benefit of both; and so decreed A to account for a moiety to B.

Chapman
and Turner,
4 Burn, Ec.
Law.

Where a man makes a will and appoints an executor, and gives him a legacy, and does not dispose of the residue

Foster and
Manch,
1 Ver. 473.

of his estate, such executor will be a trustee as to the surplus for the next of kin.

2 Atk. 18.
46.

This was the first case upon this head; but many distinctions have been taken since: making a man an executor is a gift in law of the personal estate, and therefore unless it appears that the executor has a legacy, or was intended to be an executor in trust, the executor will be intitled to the personal estate undisposed of at law and in equity; but where a necessary implication, or a violent presumption appears, that the testator by naming the executor meant to give him only the office of executor, and not the beneficiary interest, he shall, although he has no legacy, be considered as a trustee only for the next of kin.

2 Atk. 68.

It was settled by Lord *Hardwick* in two cases, that where an executor has a legacy so as to make him a trustee for the next of kin, as to the surplus in equity, yet that the executor shall be allowed, if he can, to give evidence by parol, that the testator intended to give him the residue, and such evidence is now constantly admitted, because the executor, by being made so, has the legal estate in the testator's personal estate, and the right of the next of kin is but a trust in equity; and such evidence is admissible in support of his legal right and to rebut the equity of the next of kin.

A devised the residue of his real and personal estates not before devised, to his two executors as tenants in common; one of the executors was indebted to the testator by bond; and although it was agreed, that making a debtor an executor was a release at law of the debt, except against creditors, yet it was resolved that the bond was not released or extinguished in equity, but that the debt was assets in equity to pay debts and legacies, and that the executor must account with the other residuary legatee for a moiety. *Brown and Selwyn, Forrester* 240. *Pér L. Talbot*, and afterwards upon an appeal affirmed in the House of Lords.

Where an executor or administrator before probate, or taking out administration, files a bill, and *after* proves or administers, such subsequent administration relates to the death of the intestate; and so the probate, though subsequent to the filing of the bill, is good, and the taking out letters of administration may be charged either by amendment or supplement.

Note. Administration taken out in a foreign court, as at *Paris*, is not taken notice of by our courts.

Wherever a demand is made out of assets certainly due, but payable at a future period, the person entitled thereto may come into this court against the executor, to have it secured for his benefit, and set apart in the mean time, that

he

he may not be obliged to pursue these assets through several hands.—So a bill may be brought to secure a contingent interest devised over, otherwise it may be wasted in the mean time, and the costs shall be paid out of the testator's assets, who has by his will occasioned the difficulty. 1 Ves. 283.
3 Will. 304.

The administrator at this day is not a servant to the ordinary, but has as fixed an interest as an executor who is appointed by the party himself; and though the ordinary is by the statute 21 H. 8. c. 5. restrained to grant administration to the next of blood; yet he is not so restrained as to make an administration granted by him, though contrary to the statute, a mere nullity; for if such administration was void, then all disposition of the goods of the intestate, pending the said administration, and before the repeal of it, would be void also, and after it was repealed trover would lie for these goods, which cannot be: thus if an administration committed to a creditor be afterwards repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and all administration of goods made by him shall stand. 1 P. Will.
25—41.

—And it was said in the last case, that in the vacation time one may resort to Chancery, and upon a suggestion, that the Spiritual Court has proceeded to grant administration to a wrong person, may have a prohibition out of that court returnable into the King's Bench or Common Pleas.

If a legacy be left to a man of full age, the executors shall answer interest after the year from the testator's death, from the time the legacy is demanded by the legatee, because it is a deposit in the hands of the executors for the benefit of the legatee, and that deposit must be answered upon demand.—But if it be a legacy to infants, there it shall be answered with interest from one year after the death of the testator, because the executor is considered as a trustee, who ought to act for the benefit of the infant, and who ought to put out his legacy under the decree of the court. 1 Ves. 370.
2 Ves. 563.
Prec. Chan.
11, 2 Eq.
Abrid. 564.
569.

Charitable legacies that are pecuniary shall, on a deficiency of assets, come into average, as well as other pecuniary legacies.

Note. The rule of proving a will in Chancery is this, viz. If the subscribing witnesses to a will of land are all living, they must all be examined; if all three are dead, the court will give credit to the hand writing, and therefore, proof that they are all dead, and also proof of their hand-writing, is sufficient to establish the will.

And a court of equity requires all three to be examined, if living, and if any of them are beyond sea, and not amenable to the court, yet he or they must be examined by commission, and it must be proved that you could not examine him or them, or that they could not be examined; and proving them abroad, without also proving an attempt to examine them, will not do.—This is the rule in equity. At law it is otherwise: for the common way is to call but one witness to prove the will, but that is where there is no objection by the heir, for he is entitled (if he pleases) to have them all examined; but then it is incumbent upon *him* to produce them, for the devisee need but produce one, if that one will prove all the requisites; where all the witnesses are dead, their death and hand-writing must be proved; but whether all the circumstances necessary to the execution and attestation are had or not, is evidence to be left to a jury.

Per Sir T. Sewell, Master of the Rolls, 1772.

With respect to personal estates, the rule in equity is, to produce the probate and not the will; so if a feme covert or an infant executes a power relating to a personal estate by will, the will being testamentary, the probate must be produced, but such probate is not evidence that the power is well executed; for to shew that, the original instrument must be produced and shewn proved.

In a will devising lands three witnesses must subscribe their names in the presence of the testator, so a will in writing revoking a will of land, must be subscribed by three witnesses, but this need not be in the presence of the testator.

CHAPTER THE EIGHTH.

Of the Jurisdiction of the Court of Chancery, in Matters not immediately referable to either of the foregoing Branches.

THE court of Chancery will compel a husband to give alimony to his wife. So if the wife is separated by the cruelty of the husband, and afterwards 6000*l.* part of her portion, is prayed to be vested in lands, to be settled, pursuant to articles, upon the husband for life; the court will decree that the same shall be settled for the separate use of the wife until cohabitation. So it will

1 Ch. Rep. 44.

1 Ver. 493.

will an additional portion which accrues to the wife after separation.

If a rent be reserved upon a lease, it may be apportioned in equity where it shall not by law: as if a common is recovered out of part of the land demised, though the land itself is not evicted; yet the rent shall be apportioned, if after the recovery the rent reserved is too great.

²Ver. 671.

Caf. Chan.

³¹.

So if a parson, incumbent of a rectory, and the grantee of the next avoidance, join in a lease of tithes, the rent to be paid at *Easter* and *Martinmas*, and the parson dies before *Martinmas*, the lessee having collected the greatest part of the tithes, equity will apportion how much rent shall be paid to the executor of the parson, and how much to the grantee.

²Ver. 204.

This court will relieve where unreasonable engagements have been made, or engagements without consideration.

It will reduce the general customs of a manor to a certainty, and will relieve a copyholder against the ill usage of the lord.

This court will also ascertain the fines of copyholders, decree for a liberty of common, fishing, &c. and upon every interruption order an attachment.

This court will confirm an arbitrament made pursuant to an order of the court; and may confirm it in part, and make it void in part.

Caf. Chan.

86. 48.

So it will enforce an award, made on submission of the parties, without an order of the court. And that, though the award was defective: as where land was awarded to A, where it was intended to be to him and his heirs, as appeared by the depositions of all the surviving arbitrators.

²P. Will.

450.

¹Chan. Rep.

85.

So on the other hand, this court will relieve where the award appears to be unreasonable, or where it appears the arbitrators mistook the fact or the law.

²Ver. 705.

And the court may examine the reasons and grounds of the proceedings of the arbitrators, and what matters they considered: and where the award is repugnant, or impossible to be performed, or made without the assent of the parties, though the solicitor assents, a court of equity will in such and in all cases of corruption or partiality, on the part of the arbitrators, or where they exceed their authority, relieve.

Caf. Chan.

87. 279.

²Ver. 251.

485.

Note. By the statute 9 and 10 W. 3. c. 15. in matters in which there is no remedy but by personal action or suit in equity, parties may agree that their submission to an

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award be made a rule of any of his Majesty's courts of record, and insert such agreement in their submission; which agreement so inserted, shall, on affidavit read and filed in court, be made of record, and a rule of court shall be, that the parties be concluded by such award, and if they refuse to obey it, process of contempt to a rule of court shall issue, and not be stayed by any other court of law or equity, unless it appear on oath, that the arbitrators misbehaved themselves, and such award was procured by corruption or undue means: but an award by corruption or undue means shall be set aside by any court of law or equity, so as complaint be made in the court where the rule was made for such submission, before the last day of the next term after the award published. And therefore, by virtue of the above statute, a submission to an award shall be made a rule of equity, as well as of the courts of law.

Com. D'g.
tit. Award.

The court of Chancery will compel every person concerned in the estate of the bankrupt, to make a discovery to the assignees under the commission; and though he was servant to the bankrupt, and had given an account to him, and was examined before the commissioners; this was ruled upon a plea of such matter, and the plea was overruled.

2 Ch. Caf.
73.

So this court will have proof of a debt if the commissioners disallow it, and will direct a distribution of a debt, recovered by the assignees, to the creditors of the bankrupt, if the assignees are in fault; so where a fraudulent distribution is made, as if made before the lands and effects were sold, a court of equity will disallow the same.

2 Ver. 162.

So this court will aid a creditor of a bankrupt, being an assignee of stock, before the bankruptcy, and though such assignment was only executed to him the day before the bankruptcy, for there may be a just reason why a bankrupt should prefer one creditor to another; but if the assignment be of the whole of the bankrupt's estate, to prefer any creditor, there it will be void, and this court will not relieve if the party is not a bankrupt at law: for there is no such thing as an equitable bankruptcy, but the bankruptcy must be a legal one.

2 P. Will.
240 and the
reasons and
authorities
there cited.

The court of Chancery will relieve by original bill upon a gift to charitable uses, within the statute of the 43 *El.* c. 4. and will oblige trustees to charitable uses to act or assign their trust; and by a bill filed by and in the name of the Attorney General, will settle or direct the disposition of a real or personal estate to charitable uses. But *note,*

Skin. 645.
Caf. Chen.
158.

1f

If the gift is not for a charity within the 43 *El.* the bill shall not be in the name of the Attorney General.

2 Ver. 387.

If lands are given to charitable uses, and afterwards by improvement they become of greater value, a court of equity will direct the improvement to be made to the same uses; so it will decree a gift to a charitable use though it is void at law; and in judging upon gifts to charitable uses, decrees the charity as near as it can to the intention of the testator.

Prec. Chan. 225.

Caf. Ch. 135.

2 Vent. 347.

Where commoners agree to inclose a common, a court of equity will compel the performance of such agreement, and will send down a commission for settling the title of all the commoners;—but *note*, This court will not retain a bill for this purpose, unless there has been a previous agreement between the commoners for an inclosure, or some benefit to be derived from the inclosure, be alledged.

1 Chan. Rep. 159.

2 Ver. 103.

So where one commoner had brought an action on the case against another commoner, for oppressing the common, and had recovered 10*l.* damages, a bill was brought by the defendant at law to examine his witnesses, to prove his right of common; and *per Cur.* Such a bill is not to be acknowledged in this court: a commoner ought not to come here to prove his right of common until he has recovered at law in affirmance of his right; but if the bill had been, that one commoner had recovered one shilling, or other small sum, for damages against plaintiff, for oppressing the common, or for using the common where he ought not; and therefore, that the other commoners might accept of like damages for what was past; to prevent charges at law, *that* had been in the nature of a bill of peace, and been a proper bill in this court.

1 Ver. 308, 309.

If the lord incloses by way of approvement within the statute of Merton, the court will not establish it before a trial at law, whether a sufficiency of common remains, and neither will the court enforce the agreement to a stint of common against those who do not agree, though the greater part of the commoners agree.

2 Ver. 301. 356. 575.

A bill lies for the severance of copyhold and freehold lands intermixed, and also to ascertain the customs of a manor. And in cases where a man has a right by custom, or prescription, for which his remedy at law is defective, a court of equity will relieve, and will direct a trial of a custom or prescription, to avoid multiplicity of suits.

Chan. Rep. 114.

1 Ver. 22.

266.

Tithes are within the equitable jurisdiction of the court of Chancery, and this court will compel payment thereof.

It has been held after demurrer, that the executor of a parson may exhibit a bill for arrears, in the time of his testator, without offering to take the single value; and the reason is, because he is not entitled to the penalty of the statute 2 and 3 Ed. 6. c. 13. as the parson is, but it is incumbent upon the parson himself to make an offer to take the single value.

1 Ver. 60.

This court will make a partition of land by commission, and, though the estate be in trust for A and B, in tail, and A be an infant, but the conveyance from the trustees shall be postponed till the full age of A, that he may join in confirming the partition; and this is grounded upon the statute, which makes one tenant in common accountable to the other, so that now since the statute they are become trustees for one another.

2 P. Will.
519.

A common recovery, by *cestui que trust*, shall have the same operation upon a trust in equity, as it shall have by law, where it is suffered, of an estate at law; and this court will aid defects in recoveries or fines.

Eq. Abrid.
258.

Rents shall be recovered in equity where there is no remedy for them at law, as a rent seck shall be decreed, though the grantee never had seizin. So if there be no attornment to the grant.

Cas. Chan.
79. 147.
Ibid. 184.
79.

CHAPTER THE NINTH.

Of the equitable Jurisdiction of the Court of Chancery with respect to foreign Courts: The Court of Equity in the Exchequer-chamber; the Courts of Equity in Counties Palatine; the Ecclesiastical Courts; the Courts of the two Universities; and the Court of Admiralty.

And first of its equitable Jurisdiction with respect to foreign Courts.

THOUGH this court cannot hold plea of land so as to bind the right thereof, but only the person, it often, where the party is in *England*, holds plea as well touching land, as other matters done in *Ireland*, or in the
planta-

plantations, or other dominions of *England*, where the things sought, or to be performed, are only personal: for though it cannot come at the possession or profits of lands out of the realm, by a sheriff or other commissioner; yet it will regulate the party's conscience in such personal matters and acts as he may do; and will imprison him if he does them not. Prac. Reg. 226.

So that if a fraudulent transaction arises within the jurisdiction of this court, and between parties resident in this kingdom (though such transactions related to lands in *Ireland*), the English court of Chancery will relieve in such case, as it has done in many similar cases reported in the books: as where A exhibited his bill to be relieved against an annuity or rent charged upon lands in *Ireland*, and setting forth, that the said grant was obtained upon a fraudulent practice in *London*; the defendant pleaded to the jurisdiction, that the lands lying in *Ireland*, the matter in dispute was properly examinable in the court of Chancery there; but the court over-ruled the plea, and ordered the defendant to pay costs for endeavouring to oust the court of its jurisdiction; and the court mentioned the case of *Archer and Preston*, in which case, if in any, the jurisdiction was local, the matter there being not only for land that lay in *Ireland*, but of a title under an act of settlement there, yet the defendant coming into *England*, a bill was exhibited against him here, and a *ne exeat regno* granted, and he put to answer a contract made of those lands; and when he departed into *Ireland* without answering, he was sent for over by a special order from the King, and made to answer the contempt, and to abide the justice of this court; for the King will maintain the authority of his courts, when they act according to law and reason.

1 Ver. 77.

So where a trustee of lands which lay in *Ireland* lived here, a court of equity decreed the trust; and it was said by the plaintiff's counsel in the argument of that case (and not denied), that a trust was purely personal, and that a court of equity here might as well hold plea of a trust that concerned lands in *Ireland*, as the courts of law may of other personal contracts, though the same might concern lands in *Ireland*; as if a man being here, in *England*, enters into a bond for granting a rent-charge out of lands in *Ireland*, there is no question but it may be sued in any of the courts here; so a covenant entered into in *Ireland*, or a contract made there, may be sued here, and so *è converso*: formerly, indeed, it was held (upon the principle that *Ireland* was a conquered country, and that though it had courts of

Of the Court of Chancery.

1 Ver. 420—
429. Latch.
234. Co. 6.
Rep.

of its own, yet they were by the King's grant, but not exclusive of the courts here) that a decree of the English court of Chancery might as well bind lands in *Ireland*, as by every day's practice it did lands that lay in foreign plantations; and a *scire facias* has been brought in the court of Chancery here, to repeal a patent of lands in *Ireland*; and it has been resolved, that lands in *Ireland* shall be assets to satisfy a bond debt here, but otherwise lands in *Scotland*; but certainly at this day such doctrine would be discountenanced.

A decree of this court will not bind lands in *Scotland*; and now we may add *Ireland* (whatever might have been the practice of former times); but it is said, that a bill may be brought in Chancery to foreclose a mortgage on lands out of the jurisdiction of the court, if the mortgagor reside within it; for equity *agit in personam, et non in rem*.

As where A, owner of the island of *Sark*, mortgaged the island to B, the plaintiff's intestate, for 500 years, in consideration of 500*l*. The bill was, that the defendant might redeem, or be foreclosed; the defendant pleaded to the jurisdiction of the court, that this island was part of the duchy of *Normandy*, and had laws of their own, and were under the direction of the courts at *Guernsey*, and not within the jurisdiction of the court of Chancery, (and for this, 4 *Inst.* 484. 2 *Anders. Rep.* 115. *Kell.* 202. were cited;) but the Lord Keeper over-ruled the plea, because the mortgage was of the whole island, and for that the court of Chancery had also a jurisdiction, the defendant being served with the process here, and *equitas agit in personam*, which is another answer to the objection.

CHAPTER THE TENTH.

Of the Jurisdiction of the Court of Chancery, with respect to the Court of Equity in the Exchequer Chamber.

THE court of equity in the Exchequer Chamber, though a particular, is not an inferior jurisdiction. But where A brings a bill in this court to foreclose B, and B pleaded that he had already exhibited a bill against A in the Exchequer to redeem, to which A had answered, and the subject-matter of that suit being the same with A's bill in this

this court; B pleaded the precedence and priority of the former suit in the Exchequer, in bar to A's bill here; but the court upon argument over-ruled the plea with costs, and said, this court must deny justice to none, and a plaintiff has a right to commence his suit in what court he pleases, and the Chancery was the highest court of equity, and though the Exchequer was an ancient court of equity, yet the same was but a private court.

1 Ver. 220.

A person may bring a new bill in the court of Chancery, though his bill in the Exchequer may have been dismissed; and after a decree in the Exchequer, which was confirmed in the House of Lords, a new bill has been brought in the court of Chancery.

1 Ch. Caf.
155. 233.
Caf. in Eq.
135.

A bill may be brought in this court, as well as in the Exchequer, for the non-payment of tithes.

But where assignees, under a commission of bankruptcy, brought a bill for an account against some persons who had seized the bankrupt's estate, by virtue of three extents,—one being for the King, and the other two being extents in aid,—the bill was dismissed, the matter being properly cognizable in the court of Exchequer, which is the King's court of revenue, for the court of Chancery will not examine the *quantum* of the King's debt, nor how far extents sued out are necessary.

2 Ver. 426.

But where a bill was brought to be relieved against an extent, taken out by the contrivance of a farmer of the excise, who having a debt owing to him by a man that had failed, procured the King to take that debt in aid, and by that means to defeat all other creditors; the court declared, that where a farmer of the excise (as the principal case was), or other accountant to the King, had sufficient estate of his own to answer the King's debt, and should use this trick to defeat other creditors, by getting the debt owing to him to be taken in aid of the debt to the King, such person should refund, with costs; and the same was decreed accordingly.

1 Ver. 469.

So this court will relieve when it appears to be a fraudulent contrivance, by an extent in aid, to gain a preference to a debt of an inferior nature.

2 Ver. 426.
But vid. the

cases of Dickinson and Molyneux. Prec. Ch. 47. and Brown and Bradshaw and others, Ibid. 153. where a contrary doctrine is held.

CHAPTER THE ELEVENTH.

Of the Jurisdiction of the Court of Chancery with respect to the Courts of Equity in Counties Palatine; the Courts of the two Universities; and the Court of Admiralty.

THE principal of the inferior jurisdictions in England are those of the counties palatine of *Chester*, *Lancaster*, and *Durham*, the courts of the great session in *Wales*, the courts of the two Universities of *Oxford* and *Cambridge*, the courts of the city of *London*, and the Cinque Ports. These are necessarily bounded by the locality, either of the subject of the suit, or of the residence of the parties litigant. Where, therefore, those circumstances occur which give them jurisdiction, they have exclusive jurisdiction in matters of equity as well as matters of law; and they have their own peculiar courts of appeal, the court of Chancery assuming no jurisdiction of that nature, though it will in some cases remove a suit before the decision into the Chancery by writ of *certiorari*. When therefore it appears on the face of a bill, that another court of equity has the proper jurisdiction, either immediately, or by way of appeal, the defendant may demur to the jurisdiction of the court of Chancery.

Pleadings by
English bill,
135.

A bill for lands lying in the county palatine of *Chester*, was dismissed, because the matter was cognizable only within the county palatine, and might be determined by the Chamberlain there.

Cary's Rep.
79.

So a bill being brought in this court for certain debts in the county palatine of *Chester*, where the defendant dwelt, was on that account dismissed.

Toth. 117.
Ib. 85. 155.

But if a man hath cause to complain in equity of a matter arising within a limited jurisdiction, if the defendant lives out of the limits of that jurisdiction, he may be proceeded against by bill in the court of Chancery.

12 Co. 113.

A man cannot sue in the Chancery of *Chester*, for a thing which in interest concerns the Chancellor there, because he cannot be his own judge; therefore he may in that case sue in the court of Chancery, otherwise there would be a failure of justice.

Ibid. 113.

The charters of the two Universities, empowering them to inquire and proceed in all pleas and quarrels in law and equity,

equity, are properly to be extended to matters at common law only, or to proceedings in equity which may arise *in such cases only*, and not to mere matters of equity, which are originally such as to execute agreements *in specie*; and conuzance of pleas is never to be allowed, unless the inferior jurisdiction can give remedy; the University Courts can only excommunicate and imprison, but cannot proceed to a sequestration of lands; therefore where the plaintiff sets forth in his bill, a contract under seal with the defendant, for making a lease of certain lands in *Middlesex*, and prays an execution of the agreement, to which the defendant pleaded, that he was head of a college in *Oxford*, and pleads his privilege of being sued there, the court over-ruled the plea, for the University Court could not give complete relief.

2 Vent. 362.

Note. A claim of privilege cannot be put in by writing, but must be by way of plea, but it need not be upon oath.

1 Ch. Caf.

237.

And if a suit is instituted against different persons, some of whom have privilege and some not, or if one defendant is not amenable to the particular jurisdiction, a claim of privilege will not hold.

Cary's Rep.

55, 6.

Hutton, 59.

So where there is a particular jurisdiction, and the parties to litigate any question are both resident within the jurisdiction of the court of Chancery, the court of Chancery will hold jurisdiction of the cause.

1 Ves. 204.

A court of equity will retain bills for the wages of seamen, and though they are recoverable in the court of Admiralty, and are properly chargeable upon the bottom of the ship; and Sir *John Trevor*, Master of the Rolls, used to say, that equity had a concurrent jurisdiction.

Gilb. Eq.

Rep. 228.

So where a case was within the mercantile law, yet it being admitted by the answer, that the charge was for tackling for the ship, it was said by the court, that a court of equity must grant the redress a court of Admiralty would, viz. upon the bottom of the ship, and that it would be very hard to send the plaintiff back again, to obtain relief, and that all the part owners ought to make satisfaction, having received the profits of the voyage which the ship was enabled to perform, by the plaintiff's furnishing the tackle.

Ibid. 227.

Where this court has an equal concurrent jurisdiction with another, if the suit be first commenced here, this court will grant an injunction to the parties, as to any suit in the other court touching the same matter, because this court has gained the priority of jurisdiction, by being first possessed of the cause.

As

Of the Court of Chancery.

Prac. Reg.
228.

As where one brings a bill here, alledging some good discharge of tithes, this court will not suffer the party to proceed on a cross bill in the Exchequer touching the same matter.

Ibid. 228.

So an injunction was granted to stay the proceedings in the Chancery at *Durham*, in case the suit there interfered with the suit here.

Ibid.

And said, the jurisdiction of this court ought not to be impeached or denied in any matters in which the King is concerned.

CHAPTER THE TWELFTH.

Of the Jurisdiction of the Court of Chancery with respect to the Ecclesiastical Courts.

Gillb. Eq.
Rep. 1.

WHERE a wife sued her husband in this court for alimony, it was objected, that this court had no jurisdiction in the case of alimony; but it was answered (to which the Lord Keeper agreed), that this was as proper, if not a properer place, than the Spiritual Court; for the Spiritual Court has only a consequential jurisdiction, for alimony is always subsequent to a separation, unless *pro missis et expensis* and a present subsistence; but this court has an original jurisdiction, or at least a concurrent jurisdiction, with the Spiritual Court, as in the case of legacies, probates, &c.

So where a wife brought her bill, by her *prochein amy*, against the defendant, her husband, for a special execution of articles, whereby the defendant was to allow her 52 l. *per annum*, for separate maintenance; and for the defendant it was insisted, that the plaintiff was not entitled to the assistance of this court for carrying these articles into execution; for that to decree that, was to decree a separation, which was the business of the Spiritual Court; but it was argued on the other side (to which the Lord Chancellor agreed), that these articles ought to be carried into execution; that they were intended to supply the sentence of the Spiritual Court; and the Lord Chancellor said, that to decree an execution of these articles, was not to invade the jurisdiction of the Spiritual Court, and that if these articles could not be executed here, they could be of no force any where; that there was no proceeding upon them at common law, because the wife could not sue her husband, and

it

it was not pretended that a Spiritual Court had any power to decree a performance of them, and so decreed in favour of the plaintiff.

Gilb. Fq.
Rep. 152,
153.

If A and B are made executors, and both prove the will, but A only acts as executor, and dies, leaving his wife executrix, and a legatee sues B in the Spiritual Court, he being liable there by joining in the probate of the will, *per* Lord Keeper: The judgments of the ecclesiastical courts are as well subject to the equity of this court, as judgments at law; and he inclined to give relief in this case, the party being without remedy by appeal, for the delegates are to judge according to the ecclesiastical law.

1 Ch. Caf.
200.

So if an infant legatee sueth in the ecclesiastical court, and afterwards in Chancery; the suit depending in the ecclesiastical court cannot be pleaded in bar, for there is no such security for the infant's advantage, especially as to interest, and bringing in an account, in that court as in this.

2 Ch. Caf.
85.

A bill was brought to have distribution of an intestate's estate, according to the statute of 22 Car. 2.; to which the defendant pleaded, that the ordinary is made judge, and appointed to take security, and that the plaintiff ought not to sue here: but the plea was over-ruled.

2 Vent. 362.

So where a widow in the Spiritual Court set up a procurator for her children, being infants, and gets her account passed, and such children's proportions ascertained there, and distribution decreed; and on giving new security, got the old security discharged; but the court, without regard to the proceedings in the Spiritual Court, decreed an account of the whole estate.

2 Ver. 47.

Where there is a fraud in obtaining a will, relating to a personal estate, such fraud is not examinable in this court, after the will is proved in the Spiritual Court, and so long as that probate remains in force.

2 Ver. 8.
76, 7.

But in the case of *Marriot v. Marriot*, determined in the Exchequer, *Michaelmas* 12 Geo. 2. 1725, it was held, after a long argument, that the court had power to examine such fraud, notwithstanding the jurisdiction of the ecclesiastical court; and an order was made accordingly.

Marriot v.
Marriot,
1 Strange.
168.—Vid.
also, 1 P.
Will. 388.
2 P. Will.
286.

Afterwards in the case of *Almsworthy v. Shapland*, in *Lincoln's Inn Hall*, 31 March 1772, before Lord *Apsley*, Chancellor, where the bill was, to be relieved against a supposed will, charged to have been obtained by forgery and divers fraudulent impositions upon one *Richard Almsworthy*, the supposed testator, praying that the will might be set aside, and that the defendant, the executor, might be decreed to account for the personal estate of this *Richard Almsworthy*, and that the

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same

same might be distributed and paid over to the plaintiffs, who were the next of kin, and heirs at law, of this *Richard Almsworthy*.

To this bill, the defendant pleaded the will of *Richard Almsworthy*, and the bequest of his personal estate to the defendant *Shapland*, and that he *had proved* the will;—on the part of the plaintiff, the case of *Marriot* and *Marriot*, determined by Lord Chief Baron *Gilbert*, and that of *Barneſſy* and *Powel*, decreed by Lord *Hardwicke*, were chiefly relied upon; but Lord *Appſley* was pleased to allow the plea: and he ſaid that Lord Chief Baron *Gilbert* was a florid ſpeaker, and could give głoſſes to any thing; and he mentioned the caſe of *Kenrick* and *Bransby*, which was ſubſequent to that of *Marriot* and *Marriot*.

In the caſe of *Kenrick*

and *Bransby* there was but a ſmall perſonal eſtate; and the great queſtions in the cauſe were upon ſeveral demifſes of the real eſtate; and by the decree in the cauſe the will was ſet aſide for fraud; but the Lords were afterwards pleaſed to reverse the decree, and diſmiſs the bill upon which the decree was founded; and that was 11th March 1727.

The court of Chancery being a ſuperior court of general juřiſdiction, nothing ſhall be intended to be out of its juřiſdiction, which is not ſhewn to be ſo. It is therefore requiſite, in a plea to the juřiſdiction of the court, to alledge that the court has not juřiſdiction of the ſubject, and to ſhew by what means it is deprived of juřiſdiction: it is likewise neceſſary to ſhew what court has juřiſdiction. If the plea does not ſet forth theſe particulars, it is bad in point of form. In point of ſubſtance it is neceſſary, to entitle the particular juřiſdiction to excluſive cognizance of the ſuit, that it ſhall be able to give complete remedy: for this court hath a ſovereign power above all other courts of equity; ſo that if there be a failure of juřiſdiction, or juſtice in their judgment, the party may be redreſſed here.

Pleadings by
English Bill,
183.
Pract. Reg.
226.

CHAPTER THE THIRTEENTH.

What Sums this Court will not hold cognizance of.

THIS court will not take cognizance of a ſum originally below the dignity of it, though by the neglect, or diſpleading of the plaintiff, it amounts to a larger.

Mof 47. q
Anon.

If a bill be brought for a leſs ſum than 10 l. the defendant may either demur to, or move to diſmiſs it.

So

Of the Court of Chancery.

67

So if a bill be touching titles of land, not more than six acres, and not of the yearly value of forty shillings, upon shewing this to the court by affidavit, the cause will ordinarily be dismissed.

Mof. 356.
Toth. 30.

But it is said, that if the bill be for rent service, though ever so small, the court will hold plea of it, because the land (which is of greater value) may escheat.

Praet. Reg. 227.

So where a suit was for the benefit of the poor, it was returned here, though under forty shillings *per annum*.

Cary's Rep. 147.

OF THE

Officers of the Court of Chancery.

And first of the Lord Chancellor.

THE Lord Chancellor (*à cancellando*, from his power to cancel letters patent, being the highest point of his jurisdiction), or Lord Keeper, is the chief judge of the court of Chancery.

4 Inst. 84.
88. Lamb.
Arch. 48.
Ellef. Obs.
Office L. C.
45. Crompt.
Jur. 41.
Rot. Parl.
14 Edw. 4.
No 26.

This is an office of the greatest weight and power, and requires not only the most uncorrupted probity, but consummate abilities, penetration, and discernment; and it may so far be traced up into ages past, as to discover, that it has still been an office of the first rank; and the Romans called him that had such an office under their Emperors by the name of *Quæstor Sacri Palatii*, and he was to be profoundly skilled in the divine and human laws, that so he might be able to explain them for the people.

With regard to the antiquity of this great officer, it is observable, that both the *British* and *Saxon* Kings had their Chancellors; and *Dugdale* mentions the names of such Chancellors as he could meet with from good authorities, throughout the reigns of the successive Kings of the *Saxon* race, until the *Norman* conquest: of these *Unwona* is the first, who is styled *Cancellarius* to *Offa* King of the *Mercians*, who began his reign in the year 758.

4 Inst. 84.
Dug. 33.
Jan. Anglo-
rum, 127.
Mat. Paris,
in Vit. Abba-
rum, p. 22.
n. 10. and p.
23. n. 20.
The anno 758.

Of the Court of Chancery.

The election or creation of Chancellors, and Keepers, was anciently of more than one sort, and also of men of divers degrees and qualities.

I shall not enter into a long discourse of those distinctions that have been taken notice of by some authors, with respect to the office and authority of the Lord Chancellor and Keeper: for all questions are now taken away by the statute 5 *Eliz.* and at this day there being but one * great seal, there cannot be both a Chancellor and a Lord Keeper of the great seal at one time, because both are but one office, as is declared by the said act: and the taking away the seal determines the office.

4 Inst. 88.
1 Sid. 338.

The constitution of Chancellor hath been of two sorts, viz. by letters patent, which hath been but rarely used; and by delivery of the great seal, which delivery is to be entered upon record; wherein it is to be observed, that the Keeper of the great seal had the seal delivered in divers manners. It was delivered to the Chancellor by the King, and immediately he took an oath, for the faithful exercising the office of Chancellor, and then he sealed writs therewith alone; and it was delivered to the Keeper without oath, and therefore he did not commonly seal therewith, but in presence of some of the Masters in Chancery.

4 Inst. 87.

And for the most part our Chancellors have been chosen by the King *durante bene placito*, and put in possession of their office by the delivery of the seal; though it is said, that in the time of King *Hen. 2.* the manner of ordaining a Chancellor, was by hanging the great seal of *England* about the neck of the Chancellor elect.

Camb. 131.

The Chancellor hath two powers, one ordinary, the other extraordinary. In his ordinary power, he holds plea of matters according to the course of the common law; and in the extraordinary power, he judgeth according to equity, moderating the rigour of the common law, and governing his judgment by the law of nature and conscience; ordering all things *juxta equum et bonum*: and having the King's power in these matters, he hath been called the keeper of the King's conscience.

2 Inst. 552.
3. 4. 4 Inst.
78, 9. Lev.
242. Sed vic.
Lamb. Ar.
62, 3. Dug.
36.

With regard to the commencement of his equitable authority, it seems to be untraceable, and to have prescription for its parent.

* King Henry 5. had two great seals, one of gold, which he delivered to the Bishop of Durham, and made him Lord Chancellor; another of silver, which he delivered to the Bishop of London to keep. And note, that historians often confound Chancellors and Keepers together.

He

He who bears this high office is styled Lord High Chancellor of Great Britain, which is the highest honour of the long robe; and he is not made by letters patent, but *per traditionem magni sigilli sibi per Dominum Regem*.

4 Inst. 87.

When the Chancellor hath received the seal from the King, there is an entry made upon the close roll in the court of Chancery, what day, and in whose presence, the great seal was delivered; which is all that is requisite.

Camb. Hist.
Chan. 180.

A Chancellor may be made so at will, by patent, but it is said, not for life; for being an ancient office, it ought to be granted as has been accustomed:—but Sir Edward Hyde, afterwards Earl of Clarendon, had a patent to be Lord Chancellor for life, though he was dismissed from that office, and the patent declared void.

4 Inst. 87.

1 Sed. 338.

This high officer, viz. the Chancellor, is to see that all things concerning the court of Chancery be directed and disposed according to his advice; and he may hold plea as well *extra terminum*, as *infra*, in matters concerning either the ordinary or extraordinary jurisdiction; and this court being always open, a man may have process issued at any time.

Broke, 116.
Crompt. Jur.
42. Stat. 4
Ed. 4. c. 21.

It belongeth to the Chancellor, *ratione officii*, to pronounce the cause of summons at the beginning of a Parliament; and he is to be present at all the King's Councils, and he is Prolocutor of the House of Lords by prescription.

Elef.

To the Chancellor belongeth the constitution and appointment of Justices of the Peace and Quorum, by commission, throughout all England. And he is a Conservator, and Justice, of the Peace throughout all England, by prescription.

Lamb. Inst.
lib. 1. c. 5.
Elef.

He is to visit all hospitals, and free chapels, of the King's foundation. And if the ordinary offers to visit them, a prohibition lies. He receives and keeps all bishoprics and baronies void, and fallen into the King's hands; and it is his privilege to present to all the King's benefices, of or under twenty pounds in the King's books, where the King is patron in right of his crown; but not if the King hath them by a collateral title, as by lapse, for then the King himself shall present: and yet these presentations, which fall to the King by lapse, must pass under the great seal; but it appears by 22 Edw. 4. c. 18. that it belongs to the Chancellor, *virtute officii*, to present to all the King's churches under the yearly value of forty marks: and no doubt the Chancellor's authority in this behalf is enlarged by the grants and letters patent of several of our Kings.

Co. Lit. 96.
344.

F. N. B. 42.

22 Ed. 4. c.
18. Wood's
Inst. 460.

Plow. 528.
38 Ed. 3.

F. N. B. 35.
K.

Of the Court of Chancery.

21 H. 8.
c. 13.

And the Chancellor may not only dispose and order the King's Chaplains as he pleaseth, but, as Lord Chancellor, he may keep and retain three Chaplains attendant on his person, who may purchase licenses or dispensations to have and keep two benefices with cure of souls.

By the statute of 27 Hen. 8. c. 11. the Lord Chancellor may pass things through the seals, without paying any fees. And to the Chancellor's office, in process of time, great authority hath been added by divers statutes.

Hist. Ch. 70.

After a statute of 5 Eliz. during a vacancy upon the death of Sir *Christopher Hatton*, the great seal was delivered to Lord *Burleigh*, Lord Treasurer *Hunsdon*, and two other Lords; and a commission to hear causes was given to four Judges, *Clinch*, *Gaudy*, *Windham*, and *Periam*. And by 1 W. and M. sess. 1. c. 21. commissioners to be appointed to execute the office of Lord Chancellor, or Lord Keeper, may use and exercise like jurisdiction, &c. which the Lord Chancellor, or Lord Keeper, of right ought to use, as belonging to their offices or otherwise: and one commissioner may hear motions, and give orders touching interlocutory proceedings, &c.

Since this statute, this high office has been several times in commission, though generally only on the dismissal or resignation of a Chancellor, till another was appointed.

The Lord Chancellor (or Lord Keeper), in case of sickness or other extraordinary business, may call some of the Judges to assist him; and such Judge so deputed may, in the absence of the Chancellor, pronounce interlocutory orders and decrees*.

Master of the Rolls.

Fort. chap.
24. Stat.
32 R. 2. c. 2.

BY the statute of 21 Hen. 8. c. 13. there are twelve Masters in Chancery. The Master of the Rolls, anciently called *Guardien de Rolls*, *Clericus Rotulorum*, or Clerk of the Rolls, and now styled in his patent *Clericus Parvæ Bagæ*, et *Custos Rotulorum*, is chief of the twelve Masters in Chancery, and a very ancient officer. His office is grantable by letters patent, either for life or at will, at the pleasure of the King,—but at this time it is always for life.

* A commission always passes the great seal to enable a Judge to sit for the Chancellor, and the Masters in Chancery are joined with him in the commission; and where a Judge sits for the Chancellor, by virtue of such commission, two of the Masters sit with him as his associates or assistants.

Both the Chancellor and the Master of the Rolls have been heretofore spiritual persons : and by a patent of *Edw.* 3. the Master of the Rolls was appointed and installed in the House of the Rolls in *Chancery-lane*, by the Lord Chancellor ; which manner of induction and instalment continued as long as the Masters of the Rolls were of the clergy ; which may be proved by the precedents of those inrolments, and the writs themselves extant of record ; but he is now sworn into his office in open court, which oath was ordained by 18 *Ed.* 3.

Vid. *Prac.*
Reg. 233.

The Master of the Rolls is, by virtue of his office, the chief of the Masters in Chancery, as well as chief clerk of the Petty Bag office, and is a judicial officer of the court of Chancery ; and on the first day of every term he sits in court with the Lord Chancellor, and formerly no doubt he sat as assistant to the Lord Chancellor : but now he is considered as taking his seat upon the bench (the Lord Chancellor being present) out of respect to the Chancellor, or perhaps to preserve in appearance the custom of former times.

Causes are set down before him to hear and determine, at his own court at the Rolls*, which he hears and determines on certain evenings in the week during term, usually on *Monday*, *Tuesday*, and *Thursday* evenings, at six o'clock ; and frequently during term he sits on mornings of his own appointment, to hear causes by consent ; and besides his sittings during term, he sits at the Rolls the day immediately succeeding the end of every term, upon causes and petitions, and continues to sit till he has gone through the number set down before him for hearing : and all such orders and decrees as are made by him, are drawn up and entered as made *per curiam*.

He is keeper of the records, judgments, and decrees of this court ; and the records and rolls of Chancery, since the beginning of *Richard* the third's time, are kept in the chapel of the Rolls : the rest are kept in the *Tower of London*.

By the statute of 12 *Ric.* 2. c. 2. he is numbered amongst the greatest officers and magistrates of the realm, by the name of Clerk of the Rolls, and before the Justices of either

* Cardinal *Wolsey*, who was Chancellor the 29th *Henry* the eighth, is said to have introduced the Masters' judging in causes in the Chancellor's absence ; and my Lord *Coke*, in the preface to his 3d Report, says, he cannot conceive the Master of the Rolls has a lawful authority so to do, or to determine causes at the Rolls (as of later times has been used), unless he is authorised by special commission under the great seal, which it seems he now is. *Prac.* Reg. 235.

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Bench, viz. "It is enacted that the Chancellor, Treasurer, and Keeper of the Privy Seal, the Steward of the King's house, the King's Chamberlain, Clerk of the Rolls, Justices of both benches, &c. shall be called to the naming of justices of peace, sheriffs, &c. and be sworn to do the same faithfully, and without affection."

Lambert n^o.
lib. 1, fol. 12.

By virtue of his office he is a general conservator of the peace throughout the kingdom; but it is said he taketh recognizances, and issues out process of the peace, &c. not as incident to his office, but by prescription; but *quære* if this be not incident to his office as Justice of the Peace.

Elef. 36 7.
Crompt. Jur.
41—46.

It appears by the statute 14 Hen. 8. c. 8. that the Master of the Rolls hath the giving the offices of the Six Clerks in Chancery; and he hath likewise the appointment of the Clerks of the Petty Bag office; the two chief Examiners, the Usher of the court of Chancery; and he hath divers prerogatives by statutes, commissions, and prescriptions.

By the statute 3 Geo. 2. c. 30*. all orders and decrees made by the Master of the Rolls, except orders of such nature as, according to the course of the court, ought to be made only by the Lord Chancellor, Lord Keeper, or Lords Commissioners, shall be deemed valid orders and decrees of the court of Chancery; subject nevertheless to be discharged or altered by the Lord Chancellor, &c.; so as no such orders or decrees be inrolled till the same are signed by the Lord Chancellor.

By the statute 23 Geo. 2. c. 25. sec. 6. the yearly sum of 1,200*l.* is granted to the Master of the Rolls, payable by equal half-yearly payments, viz. on 25th March and 29th September in every year.

You may move before the Master of the Rolls to discharge an order made by the Lord Chancellor, on a motion of course, or an order made *ex parte*, for only one side being heard, it is as a continuance of the same motion.

2 Mosley 72.

Ibid. 77.

You may prefer the same petition to the Lord Chancellor, that has been dismissed by the Master of the Rolls; for it is in nature of an appeal, and the party has no other remedy.

* This act of parliament was occasioned by a controversy which Lord Chancellor King had with Sir Joseph Jekyll, Master of the Rolls, whose power Sir Joseph asserted to be in many respects independent of the Chancellor; whereas the Chancellor contended that he was only the first Master in Chancery; and in order to refute the Chancellor's opinion Sir Joseph published "*A discourse on the judicial authority belonging to the office of Master of the Rolls in the high court of Chancery.*" William Spicer, Esq; Master in Chancery, was the supposed author of "*The legal judicature in Chancery stated, & with the remarks on the above discourse.*" To this Sir Joseph replied, and in the public opinion the controversy ended in Sir Joseph's favour.

Masters

Masters in Chancery.

BESIDES the Master of the Rolls, the chief, there are ^{2 Inst. 407.}
 eleven other Masters of Chancery. These eleven are ^{4 Inst. 82.}
 from time to time, upon death or surrender, appointed by the
 Lord Chancellor for the time being; and in ancient days they
 were sometimes created by the King's letters patent: but by
Baggott's case, 9 Ed. 4. 5. it should seem this was at that
 time worn out of use, and they were made by the election of ^{Pract. Reg.}
 the court, and swearing them. ^{236.}

Their oath is the same with that of the Master of the
 Rolls. ^{Ibid.}

Their office seems originally to have been partly to sit as
 assistants with the Chancellor and Master of the Rolls.

They are assistants or associates to the Chancellor and
 Master of the Rolls, and sit with them in court by turns,
 usually two at a time, and references touching accounts and
 matters of practice, &c. are made to them, upon which they
 make their reports, but against which reports the party affected
 thereby is at liberty if he pleases to except, and have the same,
 or so much thereof as he excepts to, brought before the court, in
 order to undergo a further investigation. And they also ad-
 minister oaths, take affidavits, and acknowledgments of
 deeds, recognizances, &c.

They were formerly styled *Clerici de prima forma*, and
 were to be grave and ancient clerks; skilful, and of long
 experience in the practice of the court: and by special ap-
 pointment of Parliament these twelve Clerks, or Masters,
 were made coadjutors with the Chancellor, and had equal
 authority with him in forming the *brevia magistralia*; for un-
 less they all agreed, they were to go to Parliament; but in all
 other cases, by the constitution of the court of Chancery,
 they are assistants or associates to the Chancellor, and Master
 of the Rolls. And they were anciently members of the
 King's court, and allowed robes out of the King's wardrobe, ^{Each has}
 and dieted as part of the King's household, for whom special ^{100 l. per}
 purveyance was made; and as in respect of their being ^{annum paid}
 counsellors, and assistants or associates to the Chancellor and ^{him quar-}
 Master of the Rolls, they have the honour to sit upon the ^{terly out of}
 bench with them in open court; so in respect of their having ^{the Exche-}
 been members of the King's courts, they attend the House ^{quer, besides}
 of which last ^{robe money,}

is paid in- of Lords^a, and have a right to assist at the coronation of
stead of our Kings^b.
rober, for-
merly allowed him out of the King's wardrobe. Pract. Reg. 238. ^a Rot. Parl.
10 E. 3. Hist. Chan. 30. 32. 43. ^b Rot. Parl. 10 E. 3. Hist. Chan. 30. 32.
43. Fleta, lib. 2. c. 13.

The latter name of Masters in Chancery they retain at this day, and also their ancient precedency before all other clerks. And now a recognizance acknowledged before any of them, and certified under his hand, is of that authority, that it is a matter of record, and as effectual as if it had been acknowledged in open court. And all deeds or indentures, which are to be inrolled in Chancery, must be acknowledged before them; and every defendant in any bill exhibited against him in this court, must swear his answer before one of them, except the defendant live in the country; where his answer is taken by commissioners.

^a In the Prac. Register it is called the 18 C. 2. not printed.

By the statute of ^a 13 Car. 2. a public office is to be kept near the Rolls, in which they or some or one of them shall constantly attend for the administering of oaths, taking captions of deeds and recognizances, and dispatch of all matters incident to their office (references upon accounts and insufficient answers only excepted), from seven of the clock in the morning till twelve at noon, and from two in the afternoon till six at night; and by this act there are fees appointed, and tables of their fees are to be put up in their offices, &c.

Where a Judge of one of the courts at *Westminster* is appointed to sit for the Chancellor, a commission passes the great seal for that purpose, and the Masters in Chancery are joined with him in the commission.

And whenever a Judge sits for the Chancellor by virtue of such commission, two of the Masters in Chancery sit as associates with him; and it has been said that, if the Masters in Chancery disagree to the opinion of the Judge, there shall be no decree, for they are equal in authority: but it is said ¹ Ver. 265. that this does not appear by the decree.

By the statute 5 Geo. 3. c. 28. 200*l.* per annum shall be paid out of the general cash in the Bank of England, belonging to the suitors of the court of Chancery: the same to be paid thereout half yearly, by an order of the court of Chancery, to each of the eleven Masters of the court, to commence from the 5th June 1765.

Six Clerks in Chancery.

NEXT in precedence to the Masters are the Six Clerks, who are under the direction of the Master of the Rolls, by whom they are appointed.

These officers are of ancient continuance, and they were heretofore spiritual persons, as may appear by the statute of 14 and 15 *Hen.* 8.

Since the reign of *Richard* the second, the reputation of their office hath so much increased, that they have been specially assigned amongst other officers to attend at the King's coronation, as appears by the records of the Heralds office.

They are principally concerned in matters of equity; and it is their business to transact and file all proceedings by bill and answer, and also to issue some patents that pass the great seal, as pardons of men for chance-medley, patents for ambassadors, sheriffs' patents, and some others: and all these matters are transacted by their under-clerks, or others by them appointed. They likewise sign all office copies in order to be read in court, and also certificates; and they attend upon the court at *Westminster* during term-time, by two at a time, and there read the pleadings.

The business of the office is transacted by their under-clerks, commonly called Sworn Clerks, each of which, to the number of sixty, has a seat in the office, each Six Clerk having a certain number, viz. ten*, which comprizes his division, besides two waiting Clerks to each division.

At this day they employ deputies in their absence (usually a sworn Clerk, or a waiting Clerk of their own division) to file the proceedings, and sign office copies and certificates.

Formerly there was an order for dividing the business among the Six Clerks, which being found to be inconvenient to the suitors, was vacated and discharged: and all clients are now at liberty to chuse their own clerks.

Besides the fees in the Six Clerks' office there are also several others which are claimed and taken by the Six Clerks, as comptrollers of the *Hanaper*, and for inrolling the warrants for patents, grants, and other matters passing under the great seal, and returned into the *Hanaper* office. Moreover, the Six Clerks, and the three clerks of the Petty Bag, are by letters patent granted by *Queen Elizabeth* in the 16th year of her reign, incorporated by the name and style
of

* Formerly there were ninety Sworn Clerks, but they are now reduced to the ancient number of sixty.
Ord. Cane.
107.

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of the Clerks of the Inrolment of the high court of Chancery, and have under them two deputies who officiate.

The Six Clerks office is in *Chancery lane*.

Of Sworn Clerks and Waiting Clerks.

IN order to be qualified for clerks in court, one must be articulated to a Sworn Clerk, and serve him five years in the Six Clerks office, and at the expiration of their clerkships, they are to be examined by the Master of the Rolls, and if approved of, they are thereupon admitted and sworn^a in before his Honour, to the good and faithful execution of their office, and thereby become Sworn Clerks of this court, and entitled to act as such; and in respect of their seats in the Six Clerks office, they are allowed to have freeholds in such, and in consequence and right thereof, they are admitted to the privilege of voting for members to serve in Parliament for the county of *Middlesex*.

^a For this data see the statute 18 E. 3. to be taken not by the Six Clerks only, but by all other officers in the Chancery, of the like quality, and their servants also.

All suitors of this court must employ one of the Sworn Clerks, or one of the twelve Waiting Clerks, practising in the said office, to act as clerk in court.

A Waiting Clerk's seat may be purchased at the end of three years, and after two more a Sworn Clerk's seat. But a Waiting Clerk cannot take an articulated clerk.

The Sworn Clerks make out all writs both special and common, and all process (except *subpoenas*) in all causes depending on the equity side of the court wherein they are respectively employed. They claim a right to, and as occasion requires, have the custody of all records relating to causes there, in which they are respectively employed; of which records they make copies for their clients, and attend the court and Masters in Chancery as occasion requires. They draw and inrol the decrees of the said court, and also make copies of all depositions taken by commission in the country. And they give their attendance in their seats in the Six Clerks office, not only in term-time but in the vacation.

All office copies made by them of proceedings in the court, are to contain fifteen lines in every sheet, and six words in every line, written orderly; and the same are to be signed with the name of the Six Clerk to whose division they belong, by himself or his deputy, or otherwise the same shall not be read, or otherwise made use of in court.

Ord. Canc. 83.
But where there are schedules, each column is considered as two words. Ord. Canc. 161.

No under Clerk is to be deprived or suspended but by order of the Lord Chancellor. By this order likewise the fees * for copies of bills, answers, pleas, &c. and for writs, commissions, and exemplifications, are limited; as to be divided between the Six Clerks and under Clerks, that is, the Sworn Clerks. And the under Clerks are to pay, and be accountable to the Six Clerks for their fees, or give notes of the name and place of abode of clients in arrear, in their discharge.

* But for these vid. the Order in Chancery, made the 28th Nov. 1743, and the new Book of Fees.

None ought to write or sit in the Six Clerks office but the Six Clerks, sworn under Clerks, and Waiting Clerks, and their clerks and agents; and no Master of the court is to deliver any answer, plea, &c. to any person but such clerks; and no Six Clerk shall deliver any bill, answer, &c. to any person but a Sworn under Clerk or Waiting Clerk, or their respective agents; also no Sworn Clerk is to deliver any bill or answer, &c. other than to his respective clerk or agent, for whom he shall answer.

Ord. Cant. 222, 3.

Of the Register.*

THE Register is a place of great importance in this court. He holds by letters patent, and hath several, viz. four deputy Registers under him, who sit in court by turns, by two at a time, and take notes of all orders and decrees made in court; and the Register's office is to note down, draw up, enter, and keep, the decrees, orders, publications, and injunctions of the court; but before the same are entered they are to be passed, that is, to have the hand or mark of a deputy register to them.

* On an appeal to the Lords the party is never put to prove the Register's hand to a decree. Mosely 35.

Rules and attachments are also to be entered in his office, by one of the entering clerks.

In his office are filed all reports from the Masters upon references, and all exceptions taken to any of the Masters' reports.

All causes, pleas, demurrers, and exceptions, are entered by the Registers in the paper; but they are not to enter any plea or demurrer, unless the order for it be brought to be drawn up at least four days after such order is pronounced for arguing such plea or demurrer, &c. and afterwards no alteration shall be made.

Minutes of decrees taken by the Registers, are to be read in open court, that if there be any mistakes, the counsel may speak for rectifying them whilst fresh in memory: but this is seldom or never done of late years.

By

Of the Court of Chancery.

By statute of 12 Geo. 1. c. 32. two orders of the court of Chancery, in the act set forth, are confirmed, and thereby (*inter alia*) it is directed, that all securities belonging to the suitors of the court, to be delivered out of the Bank, are to be certified by the Register to the Master, what security is to be delivered out, together with the numbers, dates, and sums of such securities, and the name of the cause wherein the same is to be delivered out.

Vid. the
Act.

When stock is likewise to be transferred to suitors, the Register is in like manner to certify.

And when it is to be paid out of the Bank to suitors, &c. the chequer note on the Bank for payment must be countersigned by the Register.

The Register's office is in the *New Buildings, Holbourn* end of *Chancery-lane*.

Master of the Subpœna Office.

IN this office are made out all writs of *subpœna*, both special and common. The office is granted by letters patent; and the business is transacted by deputies.

The office is in *Chancery-lane*.

Register of Affidavits.

THIS officer files and registers affidavits, and makes copies of the same, which are signed by himself or his deputy; and he also issues certificates under his or his deputy's hand, when required on any extraordinary occasion.

Affidavits in this court are generally to be filed before the same are exhibited or produced in court to ground any orders, writs, or motions, &c. Likewise copies are to be made by the Register; and no counsel, clerk, &c. shall give any affidavit in evidence that is not filed and registered in the affidavit office.

Ord. Canc.
9.

This office is also granted by letters patent.

The Affidavit office is in *Staples Inn*.

Of

Of the Examiners.

THESE Examiners are two in number, and have under them several deputies and copying clerks: they by themselves, or deputies, examine witnesses produced on either side (being first sworn by a Master upon interrogatories), take their depositions and make out copies of them, and of the interrogatories, where the same are not by commission in the country.

They give certificates, and attend the court with any deeds or writings left in their custody, whenever any occasion requires their attendance. And none but such clerks as are sworn, or their agents by them employed, shall make copies of depositions, &c. which are to be kept private in the office till publication be passed.

The Examiners' office is in the *Rolls Yard*, in *Chancery-lane*.

Of the Usher of the Court of Chancery.

THE Usher of the Chancery had formerly the receiving and custody of all money ordered to be deposited in court, and paid it back again by order; for which purpose he attended on the court: which business was by order of the court vested in the Masters in Chancery, but was afterwards taken from both the one and the other by the statute 12 Geo. 1. and vested in an officer to be called the Accountant General.

To the Usher it belongs to have the carriage of records; and by order of court, he or his deputy is to deliver parchment of due proportion to the under-clerks for inrolling of decrees.

This is done by the Clerk of the Chapel of the

Rolls, who acts as the Usher's deputy upon this occasion. Ord. Cant. 23.

Of the Accountant General.

HE is a new officer appointed by Parliament, and stands in the place of the Master and Usher, and shall do all such matters and things relating to the delivery of the suitors' money and effects into the Bank, and taking them out by

Vid. statute 12 Geo. 1. c. 32.

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by order, and keeping accounts with the Bank, as by the orders of the court of Chancery of the 26th *May* and the 4th *November* 1725, are to be done by the Masters and Usher. And the Masters and Usher were to make up their accounts with the Accountant General, and pay into the Bank all money remaining in their hands, to be placed to the account of the Accountant General; also all mortgages, tallies, and securities in the Master or Usher's name in trust for the suitors, to be assigned to the Accountant General.

Mortgages taken by the direction of the court for the benefit of the suitors, shall be taken in the name of the Accountant General, wherein the particular trust is to be specified. And the Accountant General shall not meddle with the actual receipt and custody of the suitors' money or effects, but shall only keep the account with the Bank; and the Bank is to be answerable for all money received by them, and not the Accountant General.

He is appointed to his office by the Lord Chancellor, and holds the same during the pleasure of the court; and the court of Chancery hath power to make further regulations relating to his office; and forging the name of the Accountant General to any certificate, in order to the recovering any of the suitor's money, is by the said statute made felony.

The Accountant General's office is in *Symond's Inn*.

Of the Curfitors.

THE institution of these officers is very ancient; they are in number twenty-four, and were incorporated by Queen *Elizabeth*. It is their business to make out all original writs in Chancery returnable in the Common Pleas, and amongst these the business of the several counties of *England* is severally distributed.

In the statute of 18 *Ed.* 3. they are called Clerks of Course.

The Curfitor's office is in *Chancery lane*.

Of the Clerks of the Petty Bag Office.

THE principal Clerks of the Petty Bag are three in number (of which the Master of the Rolls is chief) and have several Clerks under them. They transact great variety

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variety of business, which requires knowledge and experience in the practice of the law.

It is their business to make out writs of summons to Parliament, and commissions directed to commissioners of every shire for assessing of subsidies and taxes. They make out *Conge de Esloires* for Bishops, on their promotions to any see; also patents of customers, gaugers, controllers, and alnegers, *liberates* upon extents of statute staples, and recovery of recognizances forfeited, and all *elegits* upon them. Statute 33
H. 8. c. 22.

All offices that are found *post mortem* are brought to the Petty Bag office to be filed. In this office are entered all pleadings of the Chancery concerning the validity of any patent, or other thing, which passeth the great seal; which pleadings are according to the course of the common law. And if any question arise about the acknowledgment of any deed acknowledged in the court of Chancery before the Lord Chancellor, Lord Keeper, Master of the Rolls, or any Master of Chancery, the same is to be prosecuted in this office. And all statutes and recognizances taken before any officers of this court, to that purpose deputed, are transmitted hither.

All suits for or against any privileged person in this court are brought and proceeded on in this office only; and by the Clerks here divers things are transmitted from the riding Clerk, and the inrolment office in the chapel of the Rolls.

The Petty Bag office is in the *Rolls Yard*, in *Chancery-lane*.

Serjeant at Arms.

THIS officer attends the Lord Chancellor, and carries the mace before his Lordship; and by him or his substitutes, persons standing in contempt of the court are seized and brought up as prisoners.

Warden of the Fleet.

THIS officer attends the court in order to receive such prisoners as are committed by the court to the prison of the Fleet.

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Clerk

Clerk of the Chapel of the Rolls.

HE attends at the Rolls Chapel to search for deeds, &c. and to make out copies of the same.

And *note*; Besides these officers, there is a Clerk of the Crown in Chancery; Clerk and Controller of the *Hanaper*; Clerk for all inrolling letters patent, not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof; a Clerk of the faculties for dispensations, licenses, &c.; Clerk of the presentations for benefices of the crown in the Chancellor's gift; Clerk of Appeals, on appeals from the courts of the Archbishop to the court of Chancery; and divers other officers and clerks there are who are constituted by the Chancellor's commission or letter; and they are to attend the Lord Chancellor for particular purposes and on particular occasions: such as the Sealer of Writs, &c.

Vid. 25 H.
8. c. 20.
25 H. 8. c.
39.

Besides those already enumerated, there are other offices granted by patent from the King: as the Clerks for writing licenses of alienation; writs of licenses of protection, and many others of the like nature. And others there are which are ordained by Parliament, to be nominated and constituted by the King's letters patent: such as the Writer and Inroller of confirmations of all licenses and dispensations as shall be brought into Chancery under the Archbishop's seal.

Having enumerated the several offices which comprize the different departments of this high Court, it remains only to mention the appointment or institution of Masters extraordinary, which for certain purposes may with propriety be denominated a department of this court.

Masters extraordinary then are appointed under a commission of this court, for the taking of affidavits in the country, and are generally practitioners of eminence and reputation resident there; for it is necessary for those who are desirous to procure the appointment of a Master extraordinary, in the first place to get a certificate signed by three Justices of the Peace, or Counsellors, whereof a Mayor may be one, or a Doctor of Divinity, which certificate may be to the effect following:

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To the Right Honourable the Lord High Chancellor of Great Britain.

We whose names are hereunto subscribed, viz. A. B. of the parish of C. in the county of D. and E. F. of the parish of G. in the county of H. and A. H. of the parish of L. in the county of M. being three of his Majesty's Justices of the Peace for the said county of M. do humbly certify to your Lordship, That J. K. of the parish of L. in the county aforesaid, is a person well qualified to be a Master of Chancery for taking of affidavits in the said county; and that there is occasion for a Master extraordinary in the said place where he dwells, there being never a Master extraordinary near that place; and that the said J. K. is a person well affected to his present Majesty and Government. Witness our hands this — day of — in the year of our Lord one thousand seven hundred and eighty-nine, and in the twenty-ninth year of the reign of his Majesty King George the third.

A. B.

E. F.

A. H.

This certificate the candidate for this appointment must carry to one of the Lord Chancellor's secretaries, who procures a fiat to be signed under the Certificate, by his Lordship; which then he must carry to the Clerk of the Crown, and he makes out a commission, appointing such person to be a Master in Chancery extraordinary. — The whole fees thereof come to about seven pounds. And when the Master in Chancery extraordinary has got the commission, he is obliged, within a month after the date thereof, to take the oaths of allegiance and supremacy.

If the person to be appointed a Master extraordinary is to be sworn in as such in the country, the Clerk of the Crown makes out a commission to commissioners, with the oaths of allegiance and supremacy, to be administered to the party; which being administered, the commissioners return the commission, with an attestation of the execution on the back thereof, signed by them, to the Clerk of the Crown; who thereupon makes out a certificate on double sixpenny stamp paper, and signs the same:—and the expence, when it is by commission in the country, amounts to near nine pounds.

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THE
PRACTICE
OF THE
Court of Chancery.

CHAP. I.

AS the business of this court is chiefly taken up in its extraordinary quality, it is intended to confine the following Treatise entirely to that branch.

Bills exhibited in this court receive nominal distinctions, from their several prayers, purposes, or ends; and they may be divided into original bills, bills not original, and bills in the nature of original bills*; and under one or other of these three different classes may be ranked all the variety of bills in use in this court. But in order therefore to comprehend with the greater facility, the different kinds and distinguishing properties of bills, each bill will be arranged

* For an accurate description of the nature and properties of the different bills in use in this court, vide Mr. Mitford's very elegant and excellent Treatise upon Pleadings in Suits by English Bill: a publication most deservedly to be recommended to the attentive perusal of every student and practitioner in courts of equity.

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under the class to which it may with propriety be said to belong, and the same will be considered separately by itself, and as having no reference to another bill of the same or of a different class.

Original bills may be divided into bills praying relief, and bills not praying relief. And first, of original bills praying relief,—at the same time will be considered by and against whom the same may be filed; the parties to the suit; the matter of the bill; and the time when it shall be filed.

A party, when injured or aggrieved by the act of another, and having a conscientious claim to be redressed, resorts to this court for relief, when the peculiar circumstances of the injury sustained by him render it impossible for him to obtain an adequate remedy by an application to the ordinary courts of law.

As necessary therefore, and antecedent to the obtainment of this relief, his first step is to exhibit a bill on the equity side of this court, which is in the nature of a petition, directed ordinarily to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or to the King himself in his court of Chancery, in case the person holding the seal is a party, or the seal is in the King's hands. In this bill or petition, the complainant (the plaintiff in equity) sets forth the circumstances of his case, the species and degree of injury he has sustained, and the grounds upon which he claims to be entitled to the protection and assistance of a court of equity; and having shewn his title to be relieved, the complainant concludes his bill with praying, that the relief incident to his particular case may be extended to him; and that the defendant, or person against whom the bill

is exhibited, may answer upon oath the matters charged against him, and also that the process of the court (which is the writ of *subpœna*, and issues under the great seal) may be directed to him, to require his appearance and answer to the charges exhibited against him by the bill: but in case a Peer, or Peerefs, or Lord of Parliament, be a defendant, the bill must first pray the letter of the person holding the great seal, called a letter missive, requesting the defendant to appear to and answer the bill; and the writ of *subpœna* only in default of compliance with that request. And if the Attorney General is made a defendant, as an officer of the crown, the bill must pray, instead of the writ of *subpœna*, that he, being attended with a copy, may appear and put in an answer.

If the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of complaint is offered to the court by way of information given by the proper officer, and not by way of petition. Except in some few instances bills and informations have been always in the *English* language; and a suit preferred in this manner in the court of Chancery has been therefore commonly termed a suit by *English* bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which till the statute of the 4. *Geo.* 2. c. 26. were entered and inrolled, more anciently in the *French* or *Norman* tongue, and afterwards in the *Latin*, in the same manner as the pleadings of the courts of common law.

Suits in this court are generally commenced, prosecuted, and defended by parties in their

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own names only, except in cases of infants, lunatics, ideots, and feme coverts; and by ideots and lunatics the same are prosecuted by the committees of their persons and estates; and by infants and feme coverts in the name of some person as their *prochein amy*, or next friend, with this exception, that a feme covert, if her husband is banished, or has abjured the realm, may by herself alone exhibit a bill, for she may then act in all respects as a feme sole; and there is this distinction between a *prochein amy* to an infant, and a *prochein amy* to a feme covert, that any one may bring a bill as *prochein amy* to an infant, because it is at his peril that he brings it, but none can bring a bill in the name of a feme covert without her consent; and if such bill be brought, upon her affidavit that it was exhibited without her consent, the same will be dismissed. Bodies politic and corporate are at liberty to exhibit a bill by themselves alone; and the Queen consort, as partaking of the royal prerogative, may also do the same by her Attorney General.

1 Eq. Abrid.
72.

1 Roll 373.
Lane's Rep.
43.

The King may sue here for equity; and so may the Chancellor himself; but he shall not make a decree in his own cause.

Suits may also be brought in this court either in the party's own right, or in right of another, or in both rights united: and suits of the first description are the most numerous. Of the second are suits by executors, administrators, trustees, by the Attorney General on behalf of the crown, and of those who partake of its prerogative or claim its peculiar protection: of the last description are suits by baron and feme for lands of the right of the wife.

Ordinarily, several plaintiffs may not join for different causes; nor may several defendants be
put

put in one bill, in cases wherein the cause and charges against them are altogether different ; yet sometimes, for avoiding multiplicity of suits, and to bring all parties who may be affected by the decree before the court, a suit may be brought by parties who have separate rights and interests, as devisees, legatees, creditors, and the like.

A bill lies for solicitor's fees only, if for business done in equity, or if for business done in another court, if it relate to a demand made by plaintiff in this.

Pract. Reg.
262.
Ver. 203.

It is incumbent upon him who exhibits a bill in this court to take care that he stands not affected by any legal disability, as outlawry, excommunication, &c. ; for if he is so affected, the same may be pleaded in bar to his suit : but it is said, that outlawry, excommunication, and conviction of popish recusancy are not in some cases any disability ; and where they are a disability, if it is removed by a reversal of the outlawry ; by purchase of letters of absolution in the case of excommunication ; by conformity in the case of a popish recusant ; a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue than as they deprive him of the property which may be the object of the suit. Villenage and profession (when the same subsisted) were in the same predicament.

Treatise upon Pleadings by English Bill, in a note in the margin, 25.

A bill may be exhibited against all bodies politic and corporate, and all persons, as well infants, married women, ideots, and lunatics, as those who are not under the same disability, excepting only the King and Queen ; and when a suit is brought against an infant, ideot, or lunatic, the court will take care of their interests,

and

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and for that purpose will assign them proper guardians, by whom they must answer and defend such suits; but to a bill filed against a married woman her husband must also be made a party; unless he is an exile or has abjured the realm.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man, and as it can so seldom happen, the law in decency supposes that it never will nor can happen at all: but whenever therefore it happens that by misinformation or inadvertence the crown hath been induced to invade the private right of any of its subjects, to remedy an invasion of private right so occasioned, the application must be to the King by petition of right; and the party suggests such a right as controverts the title of the crown, grounded upon facts disclosed in the petition itself; upon which the crown may (and in such cases always will) refer it to his Chancellor to do right, and may direct that the Attorney General shall be made a party to a suit for that purpose.

Note. The Queen has also the same prerogative.

C H A P. II.

Of the Parties to the Suit.

IN the framing of a bill great care is to be taken that the same contains necessary and proper parties, for and against whom the court may respectively decree: for if upon the face of the bill it appears that a necessary or proper party is wanting, the defendant is by reason of that defect

defect at liberty to demur; or if should so happen that he waives his claim to demur, the court upon the hearing of the cause frequently refuses to proceed to a decree for want of such necessary or proper party; or if it does, the decree (*pro eadem causâ*) may be reversed; or if it be not reversed, yet none but such as were parties to the suit, and those claiming under them, are bound by the decree.

And *note*, they only are defendants to a bill, I P. Will. 593. against whom process is prayed.

A. covenants for himself and his heirs, that a jointure house shall remain to the uses in the settlement.—The jointress brings a bill against the heir for a performance; the defendant demurred; for that the executor ought to be made a party: and resolved, that though at law the creditor may sue the heir only where the heir is expressly bound; yet as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity.

3 P. Will. 331, 332, 333.

In a bill brought by mortgagee against the heir of the mortgagor to foreclose, it was objected that the executor of the mortgagor ought to be made a party, because it did not appear, but he might have paid the debt; but it was said, and so resolved by the court, that there is no necessity to make the executor of the mortgagee a party, because the bill being only to foreclose the equity of redemption, the plaintiff need only make him a party that has the equity, (*viz.*) the heir, and the course is so; neither is the plaintiff, the mortgagee, anyways bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit

of

3 P. Will. of any payment made by the mortgagor, or his
 331, 332, executor, he must prove it.
 333. Dun-

combe v. Bill for an account of the personal estate of
 Hunfley, in A, though the person who has the right to ad-
 notes. minister to A be a party, yet this is not sufficient
 without administration actually taken out; for
 if any account should be taken, it may be all
 over-hauled again when administration shall be
 taken out.

3 P. Will.
 349.

Prec. in Ch.
 63.

But in another case an objection of the kind
 last mentioned was over-ruled, and the making
 a wife a party, who had possessed herself of her
 husband's personal estate, and disposed of it, and
 who appeared to be the person by law entitled to
 administration; and though she denied by her
 answer that she had taken out administration,
 was held sufficient.

In a bill to be relieved touching a lease for
 years, or other personal duty, against executors,
 though they be executors in trust only, yet it is
 not necessary to make *cestui que trust*, or the re-
 fiduary legatees, parties.

1 Ver. 261.
 Anon. Sed

quare and vid. Bonb. 53. and Prec. in Chan. 275. where it is held that *cestui que*
trust must in all cases be made a party.

The grantee of a rent-charge must make all
 the purchasers parties; and if two or more have
 a joint interest, regularly they must be all par-
 ties. So if two or more are liable to a demand,
 you cannot proceed against one alone. So all
 executors, trustees, or their representatives, are
 to be made parties; but this rule may be dis-
 pensed with, if any of them are not amenable to
 the process of the court, or if they have stood
 out process to a sequestration.

So where there are two executors, and one of
 them lives beyond sea, the executor abroad need
 not be made a party, if the executor here has
 assets in his hands.

MS. Caf. in
 Chan. Pas.
 5 Annæ.

So where there is a general account prayed to bear a proportion of loss, and the parties, and other persons besides the parties are equally affected, the bill shall not abate for want of parties; for it will appear before the Master as if all were there.

MS. Caf. in Chan. Jeffery and Napper, Pal. 7 An-
næ.

In a suit for a charity for the arrears of a rent-charge, it is not necessary to make all the trustees tenants of the land out of which the rent issues, parties.

1 P. Will.
599.

All parties to a vestry order must be made defendants.

Hinchman
and Ayer,
Hard. 333.

A, a residuary legatee, brought a bill against B, who was one of two executors (without his co-executor) to have an account of B's own receipts and payments; the co-executor need not be made a party

2 Vol. Eq.
Abr. 165.
Caf. 3.

A. proposed to raise a bank, and to procure an act of parliament to establish and settle it; about fifty joined with him, and were at equal expences. This project being likely to take effect, two hundred and fifty more subscribed to raise a fund; but in effecting the project about 6000l. were lost, and so it dropped. Then the persons who were this 6000l. out of pocket exhibit their bill against sixteen of the two hundred and fifty subscribers to bear their proportion of the loss; and it was moved, that the bill should abate for want of parties, but over-ruled.

2 Vol. Abr.
Eq. 166.
Caf. 7.

A trustee for three persons is called to an account; all the *cestui que trust* must be made parties; otherwise he might be called to account thrice for the same matter.

1 Ver. 100.
Hanne v.
Stevens.

But one legatee may sue without the others: but though one legatee may sue, yet if the residue of the personal estate be devised to three, *quare*, whether one alone may sue for his part? and it has been held he cannot.

Haycock v.
Haycock,
2 Chan. Caf.
124.

Nelson, Ch.
Rep. 243.

All

³Chan. Rep.
92. 1 Chan.
Cas. 277.

All executors must sue and be sued: but if the plaintiff sues one executor, and alledges in his bill that he knows not the other, and prays a discovery who he is, and where he lives; this will be no cause of demurrer, and has been so ruled.

Bowyer and
Covert, 1
Ver. 95.

²Burr. 7.
Deonet,
Trin. Term
1787.

Where a trustee has assigned his trust, the assignee must be a party^a.

Brown's
Chan. Rep.
225.

If an executor of an obligation be sued in this court to discover assets, all the obligors must be made parties, that the charge may lie equal.

²Vent. 348.
²Chan. Cas.

92. and a quere is made whether you may not sue the principal, and leave out them that are bound only as sureties? but it is clear that if a judgment be had at law against one obligor, you may sue in this court the executor of him alone for a discovery of assets, &c. because the bond is merged in judgment. Vid. also Nelson, Chan. Rep. 105. where it is held not to be necessary to sue all the obligors; and that any one who is compelled to pay the money, may oblige the others to contribute.

If a debt be joint and several, each of the debtors must be brought before the court, because they are entitled to each other's assistance in taking the account, and likewise to contribution; so on specialty debts, heirs and executors must both be made parties.

³Atk. 406.
Madox v.
Jackson.

A begins his will thus: As to all my worldly estate, my debts being paid, I give, &c. and then devises part of his fee simple estate in fee to his brother B; and other parts of his estate to C and D. B entered, and devised his real and personal estate to his wife and son, who sold their lands for a valuable consideration. The simple contract creditors brought their bill against the several devisees of the premises, and the purchasers, to have the lands sold for satisfaction, &c.; but the nephew and heir of the first testator was not made a party to the bill; and held by the Master of the Rolls, that as the estate

tate had been for some length of time quietly enjoyed under the will, it was not necessary; but generally where lands are devised to pay debts, if creditors bring a bill to compel a sale, the heir is to be made a party; otherwise in case of a trust created by deed to pay debts.

3 P. Will.
91, 92. Har-
ris v. Ingle-
done,

Where there is only an equitable charge on a copyhold, and the legal estate descends to the heir, it is necessary to make the heir a party, otherwise the legal estate of the copyhold could not be conveyed to a purchaser; but if the heir at law had after the testator's death conveyed away all the copyhold estate, then such grantee being capable of conveying to the purchaser, it might not be necessary to make the heir a party.

3 P. Will.
97.
a Lowe v.
Morgan,
Brown's Ch.
Rep. 368.
Easter Term
1784.

Where there are three mortgagees being joint tenants, one cannot bring a bill to foreclose without making the others parties^a.

The secretary and book-keeper of the *East India Company* were made defendants to a bill, for the discovery of some entries and orders of the Company. Demurrer, because they might be examined as witnesses, and that their answers could not be read against the Company. Demurrer over-ruled, lest there should be a failure of justice, because the Company is not liable to a prosecution for perjury, be their answer never so false.

3 P. Will.
370. Wych
and Mead.

If there are principal and sureties, the principal cannot object that the sureties are not made parties. And if a bill be brought against principal and one surety, and it is admitted the other is dead, insolvent, and no personal assets at all, his representatives need not be made parties.

3 Atk. 406.

If

Rep. Temp.
Finch 15. If the suit be by one surety against another for contribution, supposing that A, another surety, is dead insolvent, the executors of A ought to be made parties.

3 Atk.
277. Anon. The Attorney General need not be a party to a suit relating to a private charity, such as a voluntary society to provide for the members and their widows, by weekly contributions.

a Cullen v. Duke of Queensbury and others, Trin. Term 1781. In a bill against the committee of a voluntary society who contract with a tradesman, it is not necessary to make the other members of the society parties^b.

Brown's Ch. Caf. 101. A remainder-man need not be a party to a bill, (one end of which was to impeach a settlement) because a remainder-man is not regarded in equity, neither can he be bound.

2 Vol. Eq. Ab. 160. Bill by second mortgagee, to redeem the first mortgage, the mortgagor, or his heir, must be a party; the heir being abroad the court cannot proceed^c.

1 P. Will. 445. A having outlawed B for a debt due on a bond, brought his bill against B, and C a trustee for B, with respect to an annuity of 20*l. per annum* devised to B, in order to subject this annuity to A's debt. By the outlawry all B's interest, as well equitable as legal, was forfeited to the crown; and A must set a grant thereof from the crown, and make the Attorney General a party.

2 Vol. Abr. Eq. 167. Where a bill is brought for surrender of a copyhold estate held for lives, the lord must be made a party; because when the surrender is made the estate is in the lord, and he is under no obligation to new grant it. *Contra*, in case of copyholds of inheritance, for there the lord need not be made a party.

Where

Where an executor in trust was outlawed, and a witness proved that he had inquired after and could not find him, it was held that it was not necessary to make him a party. 1 P. Will. 684.

One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties. Moffat v. Farquharson, Brown's Chan. Rep. 338. Easter Term 1788.

A, seised of lands in fee binds himself and his heirs in a bond, and devises his lands to B in fee, and dies; in a bill brought by an obligee in a bond to subject the devisee to the payment of debts, the devisor's heir must be made a party. Ibid. 99.

A bill of discovery of real assets may be brought against an heir, in order to preserve a debt without making an administrator of the personal estates a party, where you suggest that the representation is contesting in the ecclesiastical court. 2 Atk. 51;

If the suit be by the assignee of a legacy, the executor ought to be made a party; and it is not sufficient to say he consented. 1 Ch. Caf. 277.

Where an executor or administrator, before probate, or taking out administration, files a bill, and after proves or administers, such subsequent administration relates to the death of the intestate, and so the probate, though subsequent to the filing of the bill, is good, and the taking out the letters of administration may be charged either by amendment or supplement. 3 P. Will. 350. Humphreys v. Humphreys,

It is a constant rule in equity, whenever a bill is brought by creditors, legatees, or any other person entitled to bring it to have the trusts of a will performed, that all the persons entitled to the estate unto the first remainder in tail are made parties. As if there are many tenants for lives with contingent remainders to the issue, remainder to any person in tail, or in fee *in esse*; you

must make all the tenants for lives parties, and go on until you come to the first owner of the inheritance, and he sustains the rights of all the intermediate remainders until they come *in esse*. And if it should happen that any person preceding the remainder in tail comes *in esse* pending the bill, it is the constant practice to make him

2 Vef. 493. a party by a supplemental bill.

A. mortgages his estate to B, and then devises the equity of redemption to C in tail, with a great many remainders over. B brought a bill against C to foreclose; and it was objected to for want of parties, as the remainder-men were not before the court, and that therefore the estate could not be foreclosed without them. This question had never been settled, and *Lord Camden* took time to consider it, and he held first, that the redeeming an equity of redemption was originally a matter of favour; secondly, that the foreclosing of the first tenant in tail would foreclose all remainders, and therefore bringing him before the court was sufficient; and he said that he could not reserve an equity of redemption for remainder-men, some of whom were unborn.

Styles and
Reynolds.

A, having a bastard, leaves a personal estate to his executors in trust for the bastard, who died intestate without wife or issue. The executors brought a bill against B, for part of the personal estate. The defendant demurred, because the Attorney General and the administrator of the bastard were not parties; but the court held that the executor is legally entitled to the personal estate; and though in the present instance he is as a trustee, yet he has a legal title, and can give a good discharge to the defendant; and the demurrer was disallowed.

3 P. Will.
33.

If the mortgagee assigns a mortgage, yet he must be a party to a bill to redeem, that he may account for the profits received by him.

² Eq. Abr. 594.

An administrator (though insolvent) must be made a party to a bill for the discovery of assets.

² Atk. 51.

It is a general rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree: thus a residuary legatee need not be made a party; and for the same reason, in a bill brought by creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party, though formerly it was held that the bankrupt must be made a party.

³ P. Will. 311.

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court; for it is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation; and for this purpose all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that a complete decree may be made between the parties.

⁴ Prec. in Ch. 83.

Treatise upon Pleadings by English Bill, 144.

But at the same time it is to be observed, that great caution ought to be used in making defendants to a bill; for if a discovery only of facts (for instance) is wanted by the bill, the defendants to such bill will be entitled to their costs; and moreover, the complainant thereby deprives himself of the advantage to be derived from the evidence of those whom he has thought

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proper, or been advised to make defendants to his bill; for it is the constant rule of this court, that the answer of one defendant cannot be read against another; and besides, when it doth not appear that they have any thing in their custody, or that any thing is prayed against them, they are at liberty to demur to the bill if they please.

If a cause be adjourned over for want of parties, and though defendant be not served with any order, yet he must be served with *subpoena* to hear judgment.

Mosely's
Rep. 226.

Note, for more upon the subject of parties, vid. 2 Eq. Cas. Abrid. 630.

C H A P. III.

The Matter of the Bill.

CARE being taken that all proper and necessary parties to the suit are brought before the court, the next important circumstance to be attended to in the framing of a bill is the matter of it.

Pract. Reg.
24, 25.

The bill then must be true in substance, the matter plainly, yet succinctly alledged, with all necessary circumstances, as time, place, manner, and other incidents; and it must be of a matter cognizable in this court.

Ibid.

As it must be sufficient in substance, so it must have convenient form; but this in equity is not strict or difficult.

Ibid.

Every bill must be under counsel's hand; and if it be not, or the hand be counterfeit, or disavowed, the bill will be dismissed upon demurrer.

Ibid.

In

In case of a bill without counsel's hand, anciently it hath upon motion been ordered that the defendant should not answer, till counsel had signed the bill.

Ca. Rep.
160.

A counsel is not to put his hand to a bill, or any other pleading, unless it be drawn or perused by himself in the paper draught before it be engrossed.

Ord. Chanc.
113.

And a counsel is to take care that the bill be not stuffed with the repetition of deeds, writings, or records, *in hæc verba*, but the effect and substance of so much of them only as is material and pertinent to be set forth; and it must not be impertinent, nor criminal, nor scandalous; for if it is, the defendant may refuse to answer it until such scandal and impertinence be expunged.

And it may not be improper in this place to shew what is deemed scandal, and what impertinence. Scandal consists in any thing being alledged in a bill, answer, or other pleading, which is unbecoming the dignity of the court to hear, or is contrary to all good manners, or which charges some person with a crime not necessary to be shewn in the cause: and indeed in the last case there seems both scandal and impertinence.

Pract. Reg.
327.

Impertinence consists in setting forth what is not necessary to be set forth, as where the records of the court are stuffed with long recitals, or with long digressions of matters of fact which are altogether unnecessary and totally immaterial to the point in question; as where he sets forth a long deed, which is not prayed to be set forth *in hæc verba*; where he stuffs his answer with long recitals which are nothing to the purpose; as where a bill of revivor is brought, and

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the party will set forth *in hæc verba* not only the original bill and answer, but the whole proceedings in the cause; for all these being matters of record, and of which the party hath once paid for copies, he ought not to pay for them over again, nor is there occasion to set them forth *in hæc verba*, or to make an unnecessary repetition thereof, for they ought to be set forth very concise and short.

With respect to scandals, it must be observed, that there are many cases in which, though the words in the record are very scandalous and reflecting upon the party, yet the court does not think them so, especially where the scandal is material and tends to the discovery of the very point in question; for a man may be guilty of a very notorious fraud, or a very scandalous action, as in the case of a marriage brokerage bond, to draw in a woman to marry; or in the case where a man is falsely represented to have a great estate, when in fact he is a bankrupt; in these and many other instances which might be collected, the matter alledged may appear to be very scandalous, and not fit to remain upon the records of the court; and yet perhaps without having an answer to this very matter, the party may lose his right; and the court always judges whether, though the matter may *primâ facie* be scandalous, it is of absolute necessity to be so; and if it materially tends to the point in question, and is become a necessary part of the cause and material to the defence of either party, the court never looks upon this to be scandalous.

Gillb. For.
Rom. 207,
208, 209.

But where the scandal is altogether immaterial, and foreign to the point in question, and no way relates to the merits of the cause; in all these

these cases where the Master reports it scandalous, there the court will order the Master to expunge it out of the record, and give the party costs for this vexation ; and in the case of scandal or impertinence in a bill, the course is for the defendant to move the court, upon which he obtains an order to have the bill referred to a Master, and he reports whether it be scandalous or impertinent, which if so reported, the court upon motion will make another order that such scandal or impertinence be expunged by the said Master ; and that the plaintiff shall pay the defendant his costs occasioned by such impertinence or scandal, to be taxed by the said Master ; and though costs are only awarded and even directed to be taxed, yet the Masters generally allow full costs, and at the end of the bill there is an article of twenty, thirty, forty, or fifty pounds (as the case may be), which the party may be supposed to suffer in his reputation by means of this scandal. And it is discretionary in the Master to allow what he pleases ; and the Masters constantly make such an allowance as the circumstances of the case call for.

Ibid.
But nothing relevant is considered as scandalous.
2 Ves. 24.

The court of Exchequer

was of opinion that after an answer is come in, it is too late to refer the bill for impertinence, but it is never too late to refer for scandal. Bunb. 304. pl. 337.

A bill was brought to establish a bond for securing an annuity of 60 *l. per annum*, given the plaintiff as *premium pudicitiae* ; a cross bill was brought, praying the security may be delivered up, as the plaintiff was a common prostitute. The defendant's counsel offered to prove the plaintiff guilty of lewdness with a particular person ; it was objected, the charge in the cross bill being only she was a lewd woman, the defendant

ought to confine herself to a general character, and not to particular instances. Lord *Hardwicke* thought the objection of great consequence to the practice of the court, and took time to consider till the first day of rehearing after the term.

And on a rehearing of this cause Lord *Hardwicke* said it is sufficient to put in issue a general charge of lewdness, and under this you may give particular evidence; but then it must be pointed and applied to the general charge.

It sometimes happens that the court will pass a censure upon the counsel who signed the bill or answer with impertinent matter in it, and will even order the counsel to pay the costs of such impertinence; as where the plaintiff having inserted scandal in his bill, the Master taxed costs at 100 *l.*; the court reduced them to 50 *l.* and 5 *l.* more to be paid by the counsel whose hand was set to the bill.

Chan. Rep.
194. *Emerson v. Dal-
lison.*

If the Master upon a bill, answer, or any other pleading being referred to him for scandal or impertinence, reports the same not to be so, then he who procured the reference shall pay the costs of the reference.

Ord. Canc.
94.

A reference of an answer to the Master for impertinence was refused to be discharged, although not moved for till after notice of motion for dismissal of the plaintiff's bill for want of prosecution, because there is no established rule of the court within what time an answer may be referred for impertinence; and though Lord *Hardwicke* had compared it to the case of exceptions, when they are not brought in within two terms, he had not laid down a rule upon the subject.

Thinworthy
v. Allen,
Trin. Term 1784. *Brown's Chanc. Rep.* 400.

C H A P. IV.

The Time when the Bill shall be filed.

THE bill being drawn, or perused, and signed by counsel, it must then be fairly engrossed on parchment with double one shilling stamps, and carried to a clerk in court to be filed, who first enters it in his cause-book, and then in the general bill book of the office; after which he marks it at the top with the day of the month and year, and subscribes his name at the bottom on the left side, and then delivers it to his six clerk, if in his study, to be filed; but if the six clerk be absent, he puts it over his study door, and the six clerk having entered it also in his book, files it.

Anciently the bill was filed before the issuing of the *subpœna*, and was a petition for it.

And there being a deviation from this practice that proved inconvenient and burthensome Praet. Reg. 27. to the subject, it is enacted by the statute 4 and 5 Ann. c. 16. sec. 22. that no *subpœna* or process of appearance should issue till after the bill is filed with the proper officer, in the courts of equity, unless in case of bills for injunctions to stay waste, or to stay suits at law, and a certificate thereof, brought to the *subpœna* office, under the hand of the six clerk, or other sworn clerk who usually files bills in equity: and for which certificate he shall receive no fee.

All bills are to be dated the same day they are brought into the six clerk's office; and no six clerk to presume to antedate any bill; and no under clerk to presume to keep any bill by him but

Ord. Canc.
114.

Ibid. 114.
55. 84. 431.
Quære
whether the
practice is
not other-
wise?

but with the first opportunity deliver the same to the fix clerk, or his allowed deputy in his absence, to be accordingly filed.

No bills, answers, or other pleadings shall be said to be of record, or to be of any effect in court, until the same are filed with such of the fix clerks with whom they ought properly to remain. Nor are they to be copied till the same are so filed.

CHAP. V.

Of amended Bills.

AN amended bill is esteemed but a continuation of the original bill, and both reckoned but as one. And where any alteration is made in a bill before the cause is at issue, this is called an amended bill, and obtained by the order of the court.

If any oversight in a bill is discovered which requires an amendment before an answer, the plaintiff may upon motion or petition either amend or dismiss his bill; but if the defendant has appeared and taken a copy of the bill, the bill cannot be dismissed without payment of costs to be taxed. And after an appearance, if before answer, the plaintiff may move and obtain an order of course to amend his bill without costs (but in this case he must amend the defendant's copy); but if the plaintiff wants to amend his bill after the defendant hath put in his answer, and he requires an answer to the amendments, he may move to amend his bill on payment of twenty shillings costs to the defendant (which is a motion of course), but then he must

must take care to pay those costs on the amendment of his bill, and before he proceeds against the defendant, otherwise he will be guilty of irregularity; and in this case the defendant must be served *de novo*, and proceeded against as in the case of an answer to an original bill, since an original and amended bill are in the eye of equity only one bill, and both make up but one record.

If the amendment is in a material point, the clerk or solicitor on the other side must have notice of the amendment; and his copy must be amended accordingly; and if the amendment is so large that the defendant will require a new copy, the party amending must pay twenty shillings costs.

Pract. Reg.
29.

So if the amendment require the defendant's further answer, the plaintiff must pay costs.

Ibid. 29.

After answer the plaintiff may have leave to add parties, or amend his bill with respect to them without costs; and so he may in other matters, if he requires no further answer of those that have already answered, and that the defendant be at liberty to answer if he thinks fit. But the amendments must be so small, that the defendant's copy may be conveniently altered as to the amendment (which the court will order to be done), or else he must pay twenty shillings costs; because the defendant must take a new copy.

Ibid. 29.

If the amendments are small, the old ingrossment may be amended. If not, there must be a new one, or a supplemental bill, whereto counsel's hand must be set.

Ibid. 29.

Where three or four orders are obtained for the amendment of a bill, and new ingrossments made under those orders, the rule of the court is, that if the plaintiff moves for further liberty

Barnard.
Rep. 232.
Brindfel v.
Sir J.
to Thompson.

to amend his bill, he shall pay full costs to be taxed.

But in a late case the plaintiff having obtained an order for amending his bill on payment of twenty shillings costs, the defendant moved to discharge that order, and that the plaintiff might pay taxed costs. And the ground of this application was, that the plaintiff had amended his bill three several times before with very large amendments; and the expences to which the defendant had been put in taking office copies of these amended bills were three times as much as the forty shillings costs allowed.

Brown's Ch.
Cas. 291.
Earl of
Massarene
v. Lyndon.

The Lord Chancellor said, that the mere statement of the number of sheets in the several amended bills, was not sufficient to break through the general rule; but in order to do this a defendant must state a case of particular oppression. There must be a general rule upon this subject, and that general rule allows but twenty shillings costs, and must be abided by; and the motion was refused.

If a defendant answers insufficiently, and you except to such answer, and it is referred to the Master, who upon argving the exceptions before him reports the answer insufficient; in this case you may move to amend your bill without costs, suggesting in the motion that the answer is reported insufficient, and praying that he may answer the exceptions and amendments at the same time; but if you except to the defendant's answer, and the defendant submits to answer, and you find it necessary to amend your bill, here it may be done without costs.

At any time before publication the court will suffer the plaintiff to add parties; and without costs, if there be no plea or demurrer; and if the
addition

addition be so small as not to require a new copy of the bill, nor any further answer, and the plaintiff amending the defendant's copies, and even after publication, and at any time before hearing, upon cause shewn, the plaintiff may obtain an order to add parties to his bill; Pract. Reg. 264. but in this case, the cause as to such new defendants must be heard upon bill and answer.

Plaintiffs may be struck out of the bill any time before hearing, a special order of the court being had for that purpose; but this cannot be done without an order and notice given to the defendants, because by striking out one of the plaintiffs you lessen the defendant's security for the costs.

So a defendant may be struck out at any time before hearing, but if it be after appearance it will be with costs; the bill as to him being dismissed.

If a defendant by answer disclaim all interest in the matter in question, or appears to be a disinterested person, his name may commonly be struck out at the request of either plaintiff or defendant; but it must be with costs to be taxed after answer.

On a plea in abatement for want of proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave to amend on payment of the costs of the day. 1 P. Will. 428.

There can be no amendment to a bill in part when it has been dismissed upon the merits. 2 P. Will. 402.

After a demurrer to the whole allowed, the bill is regularly out of court; and there is no instance of leave to amend it. Ibid. 300.

When a bill is amended, though a defendant is not bound to answer, he may, if his interest is affected; and if he does not, he shall be bound by the charges. Foster v. Foster, Brown's Ch. Rep. 616. Trin. Term 1789.

After

After publication past, and the cause set down, you can only amend by making parties, and cannot introduce new charges, or put a material fact in issue, which was not in the cause before; but a supplemental bill is to be preferred in this respect.

3 Atk. 371.
Goodwin v.
Goodwin
and others.

A plaintiff, by a false suggestion that *the cause was at issue only*, when it was in the Chancellor's paper for hearing, obtained an order at the Rolls for liberty to amend his bill; the order was discharged, and the cause put off till next Term on paying the costs of the day, that the plaintiff may have an opportunity of amending his bill.

Ibid. 583.

The original bill is to be first answered, but if the plaintiff in that bill will, after the cross-bill filed, amend his bill in things material; this amended bill, as to the amendments, is a new bill, and the plaintiff in the original bill shall be bound to answer the cross-bill, which was filed prior to the amendments made to the original bill, before such time as the said plaintiff in the original bill shall have an answer to his amendments; and as the amended bill must be answered all together, so the priority seems in such case to be lost as to the whole.

2 P. Will.
435. Stew-
ard v. Roc.
Vid. also
Ratray v.
Darby, 3
Atk. 724.
Long v.
Burton, 2
Atk.

It was said by Lord Chancellor *Hardwick*, that after publication is past, there is no instance of a plaintiff's obtaining an order to amend his bill, without withdrawing his replication.

1 Atk. 51.

The Master of the Rolls said, that the plaintiff may move to amend his bill on payment of twenty shillings costs, after a demurrer is put in, if it is not set down to be argued; and after it is set down, on payment of the costs of the demurrer; and the Register being consulted agreed to the difference.

Mosely's
Rep. Anon.
301.

Demurrer to a bill, because no representatives made parties; afterwards to help this defect the plaintiff

plaintiff took out letters of administration, and charged the same by way of amendment to the bill, having obtained an order for such amendment: it was objected that these were matters arising after the filing of a bill, therefore proper for a supplemental bill; and though this was pleaded to the bill, yet the plea was overruled, because such matters may be charged either by way of supplemental or amended bill.

3 P. Will.
351. Humphreys v. Humphreys.

A bill may be amended (by order) by adding several tenants of a manor, in order to establish a custom.

Nelf. Chan.
Rep. 114.

A conveyance set forth in a bill without date amended by order.

Ibid. 260.

The amended bill must very shortly recite the original bill, and ought to take no further notice of it, than what is necessary to introduce the amendment, in order to avoid impertinency.

When a plaintiff hath obtained an order to amend after answer, and neglects so to do, defendant may after three terms move to discharge the order, and at the same time move to dismiss the bill, in the usual manner; or if an injunction hath been obtained for default of appearance, or of answer, and plaintiff amend his bill, upon coming in of defendant's answer, defendant must, after answer to the amendment, move to dissolve the injunction *nisi*, for the injunction is not dissolved by plaintiff's amending his bill, or by defendant's answer thereto; and if after answer, and before the injunction be dissolved, defendant incur a breach thereof, he may be committed.

This was determined in the case of Mason and Murray per Lord Bathurst. Hinde's Pract. in Chan. 23.

When plaintiff hath obtained an order to amend his bill, and neglects to act under it, defendant may move that plaintiff may amend his bill in a limited time, or the order to amend

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amend be dissolved. The plaintiff sometimes excepts to defendant's answer, and then moves to amend, and that defendant may answer the amendments and exceptions at the same time; and frequently to keep an injunction in force, or otherwise, plaintiff does not amend within a reasonable time. In this case defendant may move that plaintiff be ordered to amend in a certain time, or that the order to amend be discharged, and defendant be at liberty to answer the original bill.

After a third order of amendment a defendant will be allowed costs to be taxed.

C H A P. VI.

Bill of Interpleader.*

* What persons may bring this as to copyholds, or tenant right estates, vid. Barnard. Chan. Rep. 250.

A BILL of interpleader is where two or more claiming the same thing by different or separate interests, pray the judgment of the court to which of them it belongs.

But that which is commonly called a bill of interpleader, is that which is exhibited by a third person, who not knowing to whom he ought of right to render a debt or duty, or pay his rent, fears he may be hurt by some of the claimants; and therefore prays that they may interplead, so that the court may judge to whom the thing belongs, and he be thereby rendered safe on the payment; and this he may do whether any suits be actually commenced against him in law or equity, or is only in danger of being molested: as where different persons claim the same thing in distinct and separate interests.

A bill

A bill of interpleader is sometimes necessary when one who is not party in the first suit supposes he has a separate interest in the matter in question, and brings his bill against the first or other defendant, praying to be relieved according to his right: whereupon the first plaintiff makes the second a defendant, in order to interplead and contest the right; or if the first plaintiff does not make him a defendant, then the defendant may exhibit his bill against all the other parties, and pray that they may interplead, and that the court may order and decree to which of them the thing in demand belongs, and further as his case requires: or if there be no suit here between the claimants, he, who has suits at law brought against him, or is in danger of trouble from both the claimants, may file his bill against them; and pray that they may interplead; and that the proceedings at law against him may be stayed till the right be determined.

Pract. Reg.
39.

A mortgagor brings his bill to redeem; after, come assignees of the mortgagee with a bill of interpleader; the mortgagor then makes them defendants to his bill; they say they are ready to receive the money: by the interpleader and delay of proceedings thereupon, the mortgagor keeps the money by him two years; he prays he may now pay it into court, to save further interest; which the court would not order, but gave leave to the mortgagor to set down the cause for hearing against all, upon bill and answer.

Ibid. 40.

So a bill of interpleader may be brought to assist either plaintiff or defendant: as if there be tenant for life, remainder in fee subject to a mortgage, and tenant for life prefers his bill against the mortgagee to redeem; he in remain-

der may prefer his bill to pay off his proportion and be let into the redemption.

So if there be a rent-charge granted out of lands, previously subject to a mortgage, and the mortgagee prefers his bill to foreclose, the grantee of the rent-charge may prefer his bill against the plaintiff, to come in and assist the defendant, by tendering of the money, and to save the estate, out of which his rent-charge is to come.

If a bill of interpleader does not shew that each of the defendants whom it seeks to compel to interplead claims a right, both the defendants may demur: one, because the bill shews no claim of right in him; the other, because the bill shewing no claim of right in the co-defendant, shews no cause of interpleader; or if the plaintiff shews no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.

1 Ves. 248.

The plaintiff in a bill of interpleader must annex to his bill, or upon the filing thereof, make an affidavit that he does not exhibit his bill by fraud or collusion with all or either of the defendants, or of any other person or persons, but only to be indemnified, and to pay his rent or debt safely to such person to whom this court shall order or adjudge the same to belong; and the want of this affidavit is a ground of demurrer.

Ibid.

A person preferring a bill of interpleader ought to bring the money or rent due from him into court, till which done, the court will not commonly order an injunction, or shew the plaintiff any countenance; but it has been held that it is not necessary that the party should bring the money into court, unless the other side require it; *ideo quære*. But at all events it is

Pract. Reg
39.

is absolutely necessary in such bill that the party should make an offer to bring it in, and even the whole of the money as is demanded by the original bill; and if he does not do so it is perhaps in strictness a ground of demurrer; or the court, in case such offer is not made upon application of either of the defendants, will order such plaintiff to pay the money or rent into court, or into the Bank of *England*, in the name of the Accountant General, in trust for the cause, and for the benefit of such party to whom the court at the hearing of the cause shall decree the same.

Barnard.
Rep. 251.
Earl of
Thanet and
others v.
Patterson
and others.
Pleadings
by English
Bill 126.

If a cause has been heard upon a bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff; so that if he afterwards die, the cause shall still proceed, and there need no revivor, each defendant being in the nature of a plaintiff. Ruled upon motion.

1 Ver. 351.

The affidavit to a bill of interpleader need not swear it is at plaintiff's own expence, only that there is no collusion with any of the defendants.

1 Ves. 248.

If a guardian sets up a title to himself, and conceals an infant who is suggested to have a right to controvert that title, a bill may be brought to compel the guardian to produce him.

Ibid.

A bill of interpleader cannot pray an injunction to restrain proceedings in an ejectment, because such bill cannot be as to the possession, but must be as to the payment of some demand of money.

Ibid.

An executor, as he is in *auter droit*, unless he has proved his testator's will, is not entitled to bring a bill of interpleader, till, as standing in the place of the testator by virtue of the probate,

he has made himself a debtor. At law an executor may bring an action before probate; but he cannot declare till the will is actually proved; and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate.

The person who finds it necessary to prefer a bill of interpleader, must prefer the same before any decree is pronounced; for if he postpones his bill till after the decree, it is discretionary in the court whether they will stop the execution of it; and that is never done, where it can be made to appear to the court that the party knew that the cause was in contest, and yet stood by without claiming; for then after a decree, such interposition is presumed to be malicious, in order to hinder the decree of the court from taking effect.

For. Rom.
48.

Where the plaintiff can and will make the person preferring a bill of interpleader a defendant, whereby all the purposes of such a bill may be answered, in that case such third defendant will be obliged to dismiss his bill by the rules of the court.

Ibid.

When money shall be brought into court and there remain till the heir and executor interplead, *vid.* the case of the Earl of Carlisle v. Globe and others executors of *Andrews*.

2 Freeman
148.

A bill in nature of a bill of interpleader was brought to redeem a mortgaged estate, praying that the defendants might settle the rights between themselves, that the plaintiff might not pay his money into a wrong hand.

Shotbolt v.
Bis. oc. MS.
Rep.

A bill of interpleader was filed by the lessees of several farms against annuitants who had distrained for rent on the plaintiff's farms, and the rents which had accrued were paid into court, and

and the only question was with respect to the plaintiffs costs, whether they should receive them out of the rents paid in, or await the event of the suit, and recover them against the parties who should appear ultimately to be wrong in the interpleader.

Lord Chancellor.—The tenants ought at all events to have their costs; and there being a fund in court, to be sure of them out of that fund. Nothing can be more clear, as the idea of a bill of interpleader presumes in the plaintiff a right paramount the interpleader. The party calling upon others to interplead, is in the situation of a stakeholder; and the plaintiffs were ordered their costs out of the rents in court.

Aldrich v.
Thompson,

Hil. 1787. Brown's Chan. Cas. 149. *Note*, For the defendants it was urged, that in a similar case it was determined at the Rolls, that wherever there were two legal rights, and the parties were ordered to interplead, the plaintiff in interpleader must take his costs against the party who was wrong in the interpleader.

C H A P. VII.

Certiorari Bill.

THIS species of bill derives its name from a special writ of *certiorari* being prayed for the purpose of removing a cause already commenced in an inferior court of equity from that into the court of Chancery.

And the prayer of this bill is grounded upon a suggestion necessarily arising from one or some of the following circumstances; that by means of the limited jurisdiction of the court, or by reason that the cause is without the jurisdiction of the inferior courts, or that the witnesses live out of the jurisdiction, or that the defendants do, and are not

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able by age or infirmity, or the distance of place to follow the suit; or that upon some substantial reasons shewn, equal and impartial justice to the parties is not likely to be obtained in the inferior court: and for this purpose the bill should state the proceedings in the court below; the incompetency of that court to decide between, and administer justice to the parties, and pray the writ of *certiorari*.

No appearance or answer to this bill being required, the writ of *subpœna* is consequently not prayed.

When the party has filed the *certiorari* bill in Chancery, he must enter into a bond with the Register to prove the suggestions of the bill in fourteen days. A *subpœna* must next be sued out and served; and the Register's certificate of security being given, and a certificate from the Six Clerk that the bill is filed, being obtained; a brief of the bill should be prepared, and the writ moved for in court; which being granted, and the order drawn up, passed, and entered as in common cases, the solicitor must apply to the Six Clerk to make out the writ, which is directed to the judge of the inferior court, requiring him to certify or send to this court the tenor of the bill or plaint, with the process and proceedings thereon. The writ being served and returned, together with the process and proceedings, upon motion, the writ of *certiorari*, together with the proceedings removed, will be ordered to be filed.

The interrogatories to prove the suggestion of the bill being drawn and filed with the examiner, and witnesses being examined accordingly, an order should be obtained upon motion or petition to refer the examination to a Master,
and

and the examiner to attend with the depositions; and if it appears by the plaintiff's own shewing in his bill below, that he lives out of the jurisdiction of the inferior court, without proving any allegation, an order may be obtained on motion or petition to retain the bill removed, after which the defendant must put in an answer as if the cause had been originally instituted in the court of Chancery; but if it be necessary to proceed upon the interrogatories, the Master's report must be obtained, and if he certifies the suggestions of the bill to be proved, the court must be moved to retain the bill upon such report; and in case the suggestions cannot be proved in the fourteen days, an order for further time may be obtained upon motion or petition, an affidavit of the fact sufficient to induce the court to grant that indulgence being first filed. If the suggestions are not proved, a *procedendo* may be applied for of course.

Eq. Caf.
Abr 80, 81.

The *certiorari* bond is to be entered into by the plaintiff and one surety in the penalty of 100*l.* to the Master of the Rolls and the senior Master in Chancery.

The defendant and not the plaintiff in an inferior court of equity is at liberty to remove the proceedings into the court of Chancery by *certiorari*.

And the plaintiff in this court is to examine and have publication within fourteen days after the return of the *certiorari*, to prove his suggestions, and give the court jurisdiction. The defendant is not to examine to or publish any thing to disprove it; and though the defendant should examine as soon as answer, yet the depositions shall not be published but in the ordinary course; for after the plaintiff's first

examination to affirm the jurisdiction, if the court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication according to the ordinary rules.

Toth. 145.

A *certiorari* bill was brought to remove a cause out of the Mayor's court, his witnesses living out of that jurisdiction; and inserted other matters relating to an account not in controversy in the Mayor's court. After examination of witnesses the defendant moved for a *procedendo*; and insisted that if the cause should be heard here, he could not be relieved, not having any bill here; but a *procedendo* was denied, the bill containing other matters not determinable in the Mayor's court; neither can the bill be divided, but the cause after hearing was dismissed out of this court.

Rich and
Jacques,
1 Chan. Caf.
31.

Upon a *certiorari* bill the cause is brought on to hearing; the court, if they think fit, may either send the cause back to be determined in the Mayor's court, or detain it. It has been done both ways, sometimes retained and decreed here, but oftener sent back; sometimes after publication, and sometimes after a

2 Ver. 491. *subpœna* to hear judgment.

Plaintiffs here sue for lands in the county palatine of *Durham*: one of them lives in the county of *Middlesex*; the other is an old infirm man, and not able to follow the suit; therefore a *certiorari* was granted to the Chancellor of *Durham*, to certify the proceedings depending before him into this court.

Co. Rep. 63.

Where a motion was made at the last seal to quash or supercede a writ of *certiorari*, which issued out of this court, to remove a plaint of replevin in the Mayor's court of the city of *London*,

That of the name of the case, nor the time, nor whence taken is explained. But I find, that Woodcraft v. Keraston in 2. Allr. 317. is the same case & in some reports, & see post. acc. 122. a reference accordingly.

Court of Chancery.

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don, it was objected that this writ was bad, because the *tenor* of the record is only directed to be removed, and not the record itself:

Lord Chancellor having taken time to consider it, said, where a replevin is in a court of record, you may remove it by *certiorari*, issuing either out of the court of King's Bench, or this court:

Thesaur.
Brev. 77.
F.N.B. 554.
4th edition.

As to the exception, that it is not to remove the record and process, but the tenor; I think the writ is erroneous for this reason:

There is a great difference between the record itself, and the tenor, for this is only a transcript or copy; indeed it must be literal, but still it is only a transcript; and as this is a *certiorari* to remove a record out of an inferior court, in order to be proceeded upon in a superior court, it ought to be the very record, for otherwise no proceeding can be had upon it.

There is a difference between a *babeas corpus* and a *certiorari*: that removes the body *cum causâ*, and then you must begin in the superior court, and declare *de novo*; but on a *certiorari* you must proceed on the record, as it stands when removed.

There is another difference between *certioraries* themselves: this present writ was framed, I believe, from *certioraries* brought for another purpose, for the precedents found in the Cursitor's book, which I looked into are such, and they are in order only to use the record as evidence; for if *nul tiel record* be pleaded, the court cannot have the record but by *certiorari*, and then the tenor, if returned, is sufficient as evidence of the record; and will countervail the plea of *nul tiel record*, but when the record is to be proceeded upon, the record itself must be returned.

F.N.B. 548.
in the notes
(a).

There

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There is no difference when the proceeding upon the record is to be removed, whether it be before judgment or after; in both cases the record must be returned: if it was not so, this consequence would follow, that by sending for the tenor of the record, the inferior court would be tied up, and yet the superior court could not proceed.

Salk. 147.
505.

From these authorities I think this certificate is erroneous, and if I send it to the Common Pleas by *mittimus*, this exception might be taken there, and give great delay.

The question then is, Whether I ought to quash or supersede this writ? and I am of opinion, that I cannot quash it, but must supersede it; for I cannot quash but on a view of the record itself, and so must wait for the return.

This came in question in the great case of Sir Jos. Sharp and the Mayor, Aldermen, and Commonalty of London, in the latter end of Queen Anne's time, in the court of King's Bench.

A *mandamus* issued to them by corporate names, and before the return it was moved to quash it, because misdirected, for that it ought to have been to the Mayor and Aldermen only; this was argued, and the judges differed in opinion; but Mr. Justice Eyre took an objection, that the court could not quash the writ, because it was not before them as not being returned, and that it must be a *supersedeas* only.

And the whole court were unanimously of that opinion in this respect, though they disagreed in other points.

2 Atk. 318.
Woodcraft
v. Kinaaston.

Let the writ be superseded and a *procedendo* awarded.

To a bill of appeal and a review, the cause having been heard and decreed in the county palatine

tine of *Chester*, the defendant demurred; and after a long debate, the Lord Keeper allowed the demurrer, and declared his opinion to be, that such a bill would not lie; but if any appeal lies, it must be to the King;—but in a subsequent case, the Lord Chancellor seemed to incline, that a bill of appeal would lie from an inferior court to the court of Chancery; as at common law, the King's Bench corrects all inferior courts.

2 Ver. 184.

177.

Ibid. 443.

And *note*, In a bill by way of appeal from an inferior court of equity, the plaintiff therein must complain of the injustice done him by the inferior court, but is not obliged to assign any particular errors, which is the difference betwixt a bill of appeal and a bill of review: but in this they agree, *viz.* that both must be upon the same evidence; and you cannot examine *de novo*, though in the spiritual court they examine over and over again, and proceed upon new allegations.

Note also, That from the court of equity at *Lancaster*, an appeal by act of parliament lies to the duchy court.

But after a decree to account in the Exchequer of *Chester*, it was held that the defendant shall not have a *certiorari* bill, upon pretence that his witnesses and deeds are out of the jurisdiction.

Temp.
Finch Rep.
453.

The writ of *certiorari* lies not upon *English* bill to remove *Latin* proceedings into this court, which cannot in that way hold plea thereon. 2 *Chan. Rep.* 109. but *vid.* the statute 4 *Geo. 2. c.* 26. where it seems to be otherwise.

C H A P. VIII.

Bills of Peace.

Ver. 266.

THIS species of bill is held to be a bill proper to be exhibited in a court of equity.

Ver. 30.
Eq. Caf.
Abr. 79.
pl. 2.

A bill shewing that one commoner had recovered one shilling, or other small damages, against the plaintiff, for oppressing the common, or for using the common where he ought not; and therefore that the defendant, another commoner, may accept of like damages for what is past, to prevent charges at law, is in the nature of a bill of peace, and proper in equity.

Per King
Chan. Sel.
Caf. in Chan.
74, 75.

A bill was brought by one tenant of a manor (suggesting a custom for the tenants of the manor of A (of which he was one) to cut turfs in the manor of B), to quiet him and to have an issue directed as to the right. This bill is improper, and inconsistent with the nature and end of a bill of peace, which is, that where several persons having the same right are disturbed, on application to the court to prevent expence and multiplicity of suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of one common interest, and the bill is preferred by all the parties interested, or a determinate number in the name of themselves and the rest; but in this case one only brings the bill on the general right, and not on the foot of any particular distinct right. Bill dismissed with costs.

Bill to establish a custom in the case of a common person, must regularly be founded on a trial at law; for when the right is settled it becomes

comes a bill of peace.—So where the city of London brought a bill for a customary toll, for going through one of their gates with a carriage, defendant demurred, because the toll was not established at law, and the demurrer allowed. ^{2 Eq. Caf. Abr. 172. pl. 5.}

But where the bill is founded on an *express grant of the toll*, though the rise of the toll cannot be known, yet the suit being brought *on the grant of the toll*, it is in the nature of a bill of peace.

Ibid.

Bill to be quieted in the possession of an ancient ferry used with a rope over the river *Ware*, was brought against twenty defendants (who had cut the rope), to avoid multiplicity of actions. *Per Parker*, Chancellor :

Plaintiff may have trespass for cutting the rope ; a ferry is in nature of an highway ; and a bill does not lie to be quieted in the possession of an highway—a bill lies to be quieted in the possession of a common, but that is of a different nature ; this is a navigable river, and the rope to the ferry is an obstruction of the navigation ; if plaintiff has any such right there is proper remedy for him at law.

^{4 Vin. Abr. 425. pl. 35.}

A bill was brought to be quieted in the possession of a right of common, and to prevent distresses ; and though the plaintiffs produced affidavits of above twenty years quiet possession, and evidence of their right of commonage in the time of *Q. Eliz.* yet the court refused to interpose till one or more verdicts at law ; and dissolved plaintiff's injunction obtained for want of an answer. Ruled upon motion, *per King*, Chancellor.

^{4 Gilb. Eq. Rep. 183. Annot.}

Plaintiff brought his bill in order to establish a right to an oyster fishery, and to be quieted in the possession of it against the defendant, who claimed

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claimed the pieces of ground where the fishery was, as belonging to his manor.

The defendant demurred to this bill, as it was a matter properly triable at law. And *per* Lord Chancellor *Hardwicke*:

Undoubtedly there are some cases in which a man may, by a bill of this kind, come into this court first; and there are others where he must first establish his right at law.

It is certain where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law quiet that right, he may come into this court first by a bill which is called a *bill of peace*, and the court will direct an issue to determine the right: as in disputes between lords of manors and their tenants, and between tenants of one manor and of another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant.

Vid. infra. As to the case of the corporation of *York* and Sir *Lionel Pilkington*, the plaintiffs there were in possession of the right of fishing upon the river *Ouze* for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But when a question about a right of fishery is only between two lords of manors, neither of them can come into the court till the right is first tried at law.

Therefore the demurrer must be allowed.

Where

² Atk. 483.
Lord Ten-
ham v. Hu-
bert.

Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection upon a demurrer to such bill that the defendants have distinct rights; for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights.

Mayor of
York v.
Pilkington
and others,
1 Atk. 282.

A man who has been in possession of a water-course 60 years, may bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in his possession, although he has not established his right at law. And the court said it was usual to have such bills in the first instance in this court, and cited Lord Aylesford's case lately and some others; but where the court of Chancery refused an injunction unless the party's right is established at law, *vide* the cases in the margin.

Proc. in Ch.
530. Bush
v. Western.

1 Ver.
120. 127.
2 Chan. Caf.
165. 2 Atk.
302. 3 Atk.
726. 1 Vef.
476. 2 Vef.
414.

There are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants; and where many more might be concerned than those brought before the court: such are bills for duties, as in the case of the city of *London v. Perkins* in the House of Lords, where the city of *London* brought only a few persons before the court, who dealt in those things whereof the duty was claimed to establish a right to it; but because a great number of actions may be brought, the court suffers such bills, though the defendants might make distinct defences, and though there was no privity between them and the city.

Ibid.
Per Lord
Hardwicke.

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A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

In case of a trust estate devised to be sold, or devised to *I. S.* if the will be disputed after two trials in favour of the will, equity will grant a perpetual injunction; and so after several trials in ejectment and verdicts in all, in favour of the will, equity, on a bill of peace, will grant a perpetual injunction.

1 Strange
404. 2 Eq.
Cas. Abr.
523. pl. 4.

Prec. in Ch.
261. Ibid.

Earl of Bath v. Sherwin. Vid. also, Gilb. Eq. Rep. 2. S. C. 2 Eq. Abr. 171.
c. 1. S. C. 1 Will. 672. 2 Will. 564. 1 Vef. 28. 3 Atk. 542. Bunb. 158.

But it has been determined that Chancery will not grant a perpetual injunction, though the party has had five verdicts in ejectment at law, unless there be some ingredient in the cause which gives the court jurisdiction, as trust, fraud, accident, &c.;—but, *note*, This decree was appealed from to the House of Lords, and it was reversed, an injunction being granted.

1 Brown's
Parl. Cas.
266.

C H A P. IX.

Bills Quia Timet.

WHEN a person is apprehensive of being subjected to a future inconvenience, probable or even possible to happen, or be occasioned by the neglect, inadvertence, or culpability of another; or where any personal property is bequeathed to one after the death of another person in existence, and which the former is desirous of having secured safely for his use against the effects of any accident which may happen to it, previous to the accruing of his possession;

in

in either of these cases a bill of the above description may be exhibited in this court, which in the one instance will quiet the party's apprehensions of a future inconvenience, by removing the causes which may lead to it; and in the other, will secure, for the use of the party, the property, to secure which was the object of his bill, by compelling the person in the present possession of it, to guarantee the same by a proper security entered into for that purpose, against any subsequent disposition, or wilful destruction; a sufficient case being shewn to the court to induce such interference.

If A, being seised of lands in fee, grants a rent-charge issuing thereout, and afterwards devises the land to B, for life, the remainder to C in fee, and dies : C may compel B to pay the arrears, for fear all should fall on C in reversion, although it was urged, that this was a remote possibility. Chan. Cas.
223.

So if A is bound for B, and has a counter-bond from B, and the money is become payable on the original bond, equity will compel B to pay the debt, though A is not sued; for it is unreasonable that a man should always have such a cloud hang over him. Ver. 190.

A bill was brought to deliver up an apprentice's bond and indentures, he being out of his mind; and it was ordered that the master do either bring his action within a year, or deliver up the bond and indentures; for if it were at the master's choice to stay so long as he pleased, he would perhaps stay till the apprentice's witnesses were dead. 1 Chan. Cas.
70.

So where the defendant's testator gave the plaintiff 1000 l. to be paid at the age of twenty-one years; the bill suggested that the defend-

Chan. Caf.
21.

ant, who was executor, wasted the estate ; and therefore the plaintiff prayed that he might give security for the payment of the legacy at such time as it should become due, which the Master of the Rolls decreed accordingly.

Chan. Rep.
110.

So where A had the use of goods and a library, for life, remainder to the plaintiff's wife, who was dead ; but the plaintiff, as her administrator, brought his bill to have the goods and library secured to him after the death of A ; which was decreed accordingly.

1 P. Will. 1.
Tiffen v
Tiffen 500.
Upwell v
Halley 502.

So also where one by will devised his household goods unto his wife, A, for life, and after her death to his son B, and died, having made C his executor. The son brought his bill in equity against A, his mother, and C, to have an inventory of these goods ; and that A should give security that they, at the time of her death, should be forthcoming to the plaintiff, and not be embezzled : and the question in this case being whether the devise over to B, the son, was void or not, the court were of opinion that the same was a good devise, and as if the same had been only of the *use* of the goods to the wife for life.

Vid. also Harg. Co. Litt. 20. a. the latter part of note 5. *Foley v Burnell*, *Brown's Chan. Caf.* 274. in which case goods devised to one for life, with remainders over, were taken in execution for the debt of the devisee for life, and where the nature of the property which a devisee for life has in personal chattels, and the remedies of the remainder-man were very fully discussed.

O F

Original Bills not praying Relief.

C H A P. I.

Bill to perpetuate Testimony of Witnesses.

WITNESSES are sometimes examined *in perpetuam rei memoriã*, to preserve their testimony in case of death ; and their examinations may be taken in court or by commission ; and the method of obtaining such a commission is by exhibiting a bill of the species above mentioned.

A bill to perpetuate the testimony of witnesses must shew a title in the plaintiff to the thing whereto the testimony relates ; and that the witnesses are old, infirm, or sick, or not likely to live long ; or that they are going to sea, or beyond seas, whereby the party is in danger of losing their testimony ; for this purpose the bill must pray leave to examine witnesses thereto, to the end their testimony may be preserved and perpetuated, and process of *subpœna* to the parties interested, to shew cause if they can to the contrary.

Pract. Reg.
31.

After the bill is filed, the court, upon affidavit made, that the witnesses are old, infirm, going beyond sea, and that they are very material witnesses, &c. ; if they are in the country, will on

The Practice of the

motion or petition and affidavit, grant a commission according to the prayer of the bill ; or if they are within ten miles of *London*, will order them to be examined by the examiner *de bene esse*, saving just exceptions to the other side, which will make their depositions valid in that cause only, and against those who are parties to it.

If the witness lives till he can be examined in chief, he must be examined over again, as other witnesses in chief are ; but if he dies in the mean time, then upon producing and proving the register of his death, the party for whose benefit he was examined, may apply by petition or motion for an order, with liberty to publish his depositions (but without such an order the same cannot be published) ; and to the petition must be annexed the certificate of the death of the witness, and the party must shew that he died before he could be examined in chief ; and hereupon the court makes an order not only to publish his depositions, but to read him as a witness at the hearing, saving just exceptions ; and notice of this order is always given to the adverse party's clerk in court to prevent surprise, and to give him an opportunity to object thereto as he shall see occasion.

If the witness beyond sea is not returned, there must be an affidavit of it, and that the party hath not heard from him for such a time, and that he doth not know whether he be living or dead ; and in this case the court will make the like order, as in the case of the witness who died before he could be examined in chief ; and the depositions taken in such cases will not only bind the parties in that and all other suits, but likewise all those claiming by, through, or under them.

The

The court cannot make an order to examine a plaintiff *de bene esse*, saving just exceptions, though they will make such order to examine a defendant, for the defendant should have demurred to such an immaterial plaintiff.

1 P. Will.
596. Mayor
and Alder-
men of Col-
chester, *ver-*
us

If a corporation would make use of one of its own members as a witness, they must disfranchise him.

Ibid. Note,
The method

of disfranchising is by an information in the nature of a *quo warranto* against the member, who confesses the information on which the plaintiff obtains judgment to disfranchise.

A witness was ordered to be examined *de bene esse*, where the thing examined into, lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. — So in a late case a motion was made that a witness might be examined *de bene esse*, the affidavit being, that he was the only witness to a fact material in the cause, though no age was sworn to; and said this had been allowed in *Shirley v. Ferrers*, 3 P. Will. 78. and lately in two cases of *Jenkins v. Tucker*, and *Bridges v. Bridges*. — Motion was granted.

3 P. Will.
78. Shirley
v. Ferrers.

Hankin *v.*
Middle-
ditch.
Brown's
Ch. Rep.
641. Trin.
Term 1789.

But if the party interested shew cause to the contrary, allowed by the court; there the plaintiff is to desist from examining such witness.

If by commission, he may examine *ex parte*, or the defendant may come in by appearance and join in commission, if he pleases, and then fourteen days notice is to be given of executing the commission: except in the short vacation, when ten days notice is sufficient; and the defendant may by interrogatories cross examine such witness, if he thinks fit.

Though the depositions are not ordinarily to be published while the witnesses live, yet in some

cases, as by consent of parties, or upon oath that the plaintiff has some trial at law wherein he shall need them, and that the witnesses are not able to travel, or for other good reasons shewn, the court will sometimes (though very rarely) order publication in the life-time of the witnesses; and then the party may exemplify the depositions, and they may be given in evidence in any other court, by order of this court.

If a matter is properly triable at law, as a title, and the plaintiff can have an opportunity to try it in a court of law; this kind of bill is not to be brought here till the party hath affirmed his title at law; if he should, it will be dismissed upon a demurrer.

These depositions are not to be given in evidence, or made use of against any others but the defendants who were subpcena'd to defend the matter, or some claiming under them, whose interest accrued since the bill preferred.

Where lands are devised by will from the heir at law, and there is no occasion nor opportunity to prove or establish it at law, it is often necessary to prove such will in Chancery to perpetuate the testimony thereof; the way to do which is to exhibit the bill against the heir at law, and set forth the will *in hæc verba*; and the defendant having answered, they proceed to issue, as in other cases; and then examine witnesses to the will, or prove their hands, if they are dead. The will (if witnesses are examined in town) must be left in the Examiner's office to be examined into; which being done, and publication passed, the cause is at an end, an order, or rules, being first obtained for publication: and the defendant who is the heir at law, and examines no witnesses touching the validity of the will,

may give notice of motion for the plaintiff to pay him his costs, to be taxed by a Master, which the court usually orders.

Commonly, where an estate is considerable, the plaintiff is at the charge of an exemplification of the proceedings of that cause.

But though this court permits examinations to perpetuate the testimony of a will, yet it will not barely try the validity of a will; but if the same come collaterally in question upon a bill for the performance of a trust, or touching a devise out of lands; the court generally directs an issue at law to try the validity thereof.

Where there is no occasion nor opportunity to prove and establish a will at law, it is the best and safest way to prove it in this court; and though there be goods and chattels bequeathed by the same will, whereby lands are devised, yet the proving thereof in the ecclesiastical court is of no avail in respect of the lands. And this court may prohibit the ecclesiastical court to meddle in the proof, further than concerns the personal estate.

A bill to examine *in perpetuam rei memoriam* by a devisee against a purchaser without notice, shall not be allowed in this court, till the will is established by a verdict at law.

Ver. 354.

Neither can such a bill be brought to establish one's title, until the same is first made good by a verdict at law, provided he is under no impediment of trying it at law.

Ver. 441.

Tenant in tail out of possession, cannot bring a bill to perpetuate testimony till he has recovered possession by ejectment; and demurrer for this cause would be allowed.

1 Atk. 571.
Brandlyn v.
Ord.

On a bill to discover a title to land, and to perpetuate testimony, &c. defendant answered as to the title, and demurred as to the perpetuating

1 P. Will.
117. Phil-
lips v.
Carew.

ating the evidence, in regard the plaintiff might bring his ejectment and examine his witnesses at the trial: and upon affidavit that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled by the Master of the Rolls, and afterwards by the Chancellor, Lord Cowper, on a rehearing: but without such an affidavit the demurrer had been good.

A bill was exhibited to examine witnesses *in perpetuam rei memoriam*, to prove a *modus decimandi*. The defendant demurred, for that the bill was to establish a custom against the Church, and in prejudice of tithes, which are due of common right; and several precedents were cited where bills to have a *modus* decreed, were upon demurrer dismissed; but this bill being only to preserve testimony, the Lord Keeper thought it reasonable the defendant should answer, and over-ruled the demurrer.

1 Ver. 185.

Moodalay
v. East India
Company,

Bill to perpetuate testimony of witnesses will lie before action brought.

Brown's Ch. Rep. 469. Trin. Term 1785.

A bill brought by defendant at law to examine witnesses to prove his right of common *in perpetuam rei memoriam*.—*Per Cur.* Such bill is not to be admitted in this court: a commoner ought not to come here to prove his right of common, until he has recovered at law in affirmation of his right.

1 Ver. 303.

A bill was brought for a commission to examine witnesses *in perpetuam rei memoriam*, to establish a sole right of fishery; and it was suggested in the bill that the defendant pretended a sole right of fishery, and threatened to bring actions and disturb the plaintiff when all his witnesses should be dead.

To

To this bill the defendant demurred, for that the plaintiff had not verified his title at law, and therefore had no right to bring his bill in the first instance; but the demurrer was overruled; and this difference was taken and agreed to by the court:

That if one is out of possession, having only right, brings such a bill, a demurrer will be good, because he may and ought first to establish his right at law; otherwise, publication not being to pass till after the death of the witnesses (as in those cases it never does without special order of the court), they may be guilty of the grossest perjury, and yet go unpunished; besides that the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting his witnesses.

But if a man is in actual possession, and is only threatened with disturbances by another who pretends a right, he has no other way in the world to perpetuate the testimony of his witnesses, but by such bill as this; for, not being actually disturbed, he can bring no action at law.

But in the present case, if the defendant had not only threatened to disturb the plaintiff, but had actually disturbed him by fishing daily, he ought to have pleaded this, and that the plaintiff ought therefore to seek his remedy at law; or if the plaintiff had shewn in this bill that the defendant had actually disturbed him by fishing, there the demurrer had been proper, but not for barely threatening. And a case was cited between *Wynn and Hatty*, before Lord Keeper *Wright*, at the *Inner-Temple Hall*, where a bill was brought of the same nature touching a com-
Proc. in Ch. 53^r.
 mon, and the demurrer allowed, because there it appeared of his own shewing that he was interrupted, and therefore had his remedy at law.

A bill

1 P. Will.
117. Phil-
lips v.
Carw.

ating the evidence, in regard the plaintiff might bring his ejectment and examine his witnesses at the trial: and upon affidavit that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled by the Master of the Rolls, and afterwards by the Chancellor, Lord Cowper, on a rehearing: but without such an affidavit the demurrer had been good.

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Prec. in Ch. 531.

A bill

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will, in his life-time,
 1 Ver. 105. made before his lunacy.

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill, *per et trans*, as he ought to do in a declaration at law, but it is said that such bill ought not to be brought for such trivial things as right of common, or for ways or water-courses, or at least
 1 Ver. 312. not till after a recovery at law.

Plaintiff is entitled to perpetuate testimony on an usurious contract, though he does not
 1 Atk. 450. offer to pay what is really due.

In a bill for this purpose, if the plaintiff prays
 2 Vent. 366. relief, the bill shall be dismissed.

So where a bill to perpetuate the testimony of a will was brought to a hearing, the same was dismissed with costs; but the plaintiff would at law have the benefit of these depositions though his bill was dismissed.
 2 P. Will. 162.

Upon a *subpœna in perpetuam rei memoriam*, the defendant appearing, assented to join in commission, so as the Lord Keeper Bacon's orders, touching the examination of witnesses in perpetual memory, might be observed; but upon motion, it was ordered the commission should be made
 For my Lord Bacon's Orders, vid. Pract. Reg. 31, 32, 33.
 Cary's Rep. 122. general, as in like cases where the parties join; for that it seemed to the court, the Lord Bacon's orders were intended to be observed only where the plaintiff hath a commission alone.

And it was said, the court does not give new articles to examine upon, but the parties exhibit what interrogatories they think necessary: and the proceedings upon this bill are mostly the same as in other cases.
 Pract. Reg. 35.

In a bill to perpetuate testimony of witnesses, it is said that costs are never given against the
 1 Atk. 670. defendant.

CHAP. II.

Bills of Discovery.

EVERY bill is in reality a bill of discovery; but the species of bill usually distinguished by that title, is a bill for discovery of facts resting in the knowledge of the defendant; or of deeds or writings, or other things in his custody or power; and seeking no relief in consequence of the discovery. This bill is commonly used in aid of the jurisdiction of some other court; as to enable the plaintiff to prosecute or defend an action at law; a proceeding before the King in council; or any other legal proceeding of a nature merely civil before a jurisdiction which cannot compel a discovery upon oath, except that the court has in some instances refused to give this aid to the jurisdiction of inferior courts.

This bill lies for the discovery of an estate by one who had title to it; as by the patentee of the goods of a felon, or of one outlawed; for outlawry is in nature of a gift or judgment to the King.

So where A obtained judgment against B, and the defendant, to defraud him of the benefit of it, assigned his estate to trustees for himself; A may have a discovery, though it is objected that this is in the nature of a foreign attachment, and that there could not be a discovery of a man's personal estate in his life-time.

But

1 Atk. 288.
1 Vef. 205.
2 Vef. 452.
1 Vef. 205.
Treatise on
Pleadings by
English Bill,
52.

Cary, Rep. 1.

Hard. 22.

Ver. 398,
399.

But if the plaintiff in such case has not taken out execution, it will not be allowed. And it seems agreed, it would not lie against the debtor himself, nor to have a general discovery from a third person, but only for particular things.

Atk. c. 26 pl.
254. 8 Vin.
Abr. 540. pl.
21. in notes.

Ibid. pl. 9.
Don v.
Balguy.

It was determined by Lord Chancellor *Hardwicke*, that the defendant was not obliged to discover by answer, whether he be a papist or not; in that case, on the marriage of Mrs. *Pain* with Mr. *Smith*, a settlement was made to the use of husband and wife for their lives, and after, to the first and other sons of that marriage in tail, remainder to Mrs. *Pain* in fee, who devised it to the defendant; and the bill was to discover if the devisor was not a papist, in which case the devise would be void; and on plea to this bill, Lord Chancellor held, that the defendant was not obliged to answer.

Chancery never allows a bill of discovery in aid of the ecclesiastical jurisdiction.

3 Vin. Abr.
543. pl. 6.
Guiboin v.
Fellows.

Bill for the discovery of a promissory note for 275*l.* suggesting that it was given *ex turpi causa* to smother and make up a felony. Demurrer to that part of the bill which seeks a discovery, if the note were not given to make up a felony, which is of a criminal nature; and the demurrer allowed.

8 Vin. Abr.
551. pl. 12.

Persons who claim lands by a will or any other voluntary disposition, having the law on their side, are entitled as against an heir at law to a discovery in equity of deeds relating to an estate, and to have them delivered up; otherwise the heir might defend himself at law by setting up prior incumbrances, and by that means hinder the trying the validity of the will.

Though no bill of discovery will lie on penal statutes without waiving the penalty, yet the advantage

Court of Chancery.

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advantage of pleading them seems waived by part-
ners in clandestine trade.

Gilb. Eq.
Rep. 186,
187.

In general, though a legal demand cannot be turned into an equitable one, yet in a demand of assets, plaintiff may come in here for satisfaction, though he has a remedy at law, to avoid the inconvenience of doubly suing, as he is entitled to ² Ver. 106. an account of assets in this court; and then, instead of sending him to law for satisfaction, he will get complete remedy at once.

There are cases upon which you may come into equity on a loss, though remedy may be had at law, and one is clear upon a bill of discovery. But if you come into equity not only for discovery but also for relief, on the foundation of loss, that changes the jurisdiction. And there are but three cases in which you are entitled to that; in every one of which you are obliged to annex an affidavit to the bill, to prove the loss. If the deed or instrument upon which the demand arises, is lost, and you only come for a discovery, no affidavit is necessary; but if relief is prayed beyond that discovery, the jurisdiction is changed, and there must be an affidavit of the loss. If the deed lost concerns the title of lands and possession prayed to be established, such affidavit must be annexed.

Vid. 2 P.
Will. 541.
1 Ver. 247.
310. 1 Ch.
Cas. 431.
3 Atk. 17.
Ibid. 132.

Another case is of a personal demand where a bond is lost, and a bill is brought on the loss to be paid the demand; there a bill for discovery will not be sufficient, but it must be to be paid the money thereon, but an affidavit must be annexed of the loss: and there is a difference between a bond and a note, if at law a property ² Vel. 41. in the bond itself must be made, otherwise oyer cannot be demanded by the defendant; and if oyer cannot be given, the plaintiff cannot proceed. But it is not so upon notes; no oyer is demand-

Per Lord
Hardwicke,
in the case of
Walmsley
and Child,
1 Ves. 345.

Ibid. vid. also
Terely v.
Goris, de-
termined by
Lord Not-
tingham,
Easter 28
C. 2. report-
ed in Finch
301.

Vid. also
Glyn and
the Bank of
England,

demand; proving the contents is sufficient; and there is nothing in the plaintiff's way: at law, if a plaintiff could prove the contents of his bill of exchange, or note, or indorsement, and loss of it, he might bring his action at law upon the bill without coming here; or might bring his *indebitatus assumpsit**, as for money lent, and the note given in evidence, or proved, if lost.

Bankers notes payable to A or bearer, and said by A to be lost. Seven years afterwards A's representatives brought a bill for payment in equity, but no affidavit of the loss, nor offer of indemnity to the banker; and *per Lord Hardwicke*, The plaintiff must be left for his remedy at law, because no affidavit was made of the loss, and no security given to indemnify the banker as was usual in cases of such loss. The statute of limitations was out of the case, for the defendant by his answer admitted the notes to have been given; and said, that though it was long doubted to what a bare acknowledgment to pay would go, but that was not now disputed.

If upon a deed there is no relief at law, as if it be upon a trust, which is only determinable in equity; or for a specific execution of a covenant, there the plaintiff need not annex an affidavit to his bill of the loss of such deed, nor will a demurrer be allowed for want of such affidavit, because his relief is not *in alieno foro*, and he could have no relief in a court of law upon such deed.

* It may not be amiss to observe here, that the reason of making the statute 3 and 4 Anne arose from some determinations in the beginning of her reign, by Holt, Chief Justice, that no action could be maintained on a promissory note, nor declaration thereupon: viz. *Clarke v. Martin*, and *Potter v. Pearson*, 1 Salk. 129. which cases produced the act, as the act itself recites; but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved, if lost, nothing standing in the way, as in the case of a bond. The title of this act is to give the same remedy, and to make these notes of the same effect as inland bills of exchange. Vid. statute 9 and 10 W. 3.

Every

Every plaintiff is entitled to have a discovery from defendants upon two grounds; first, to enable him to obtain a decree, and to ascertain facts material to the merits of his case, either because he cannot prove, or in aid of proof; for a man may be entitled to an answer of what he can prove, to avoid expence; secondly, that he is entitled to a discovery of matters to substantiate his proceedings, and make them regular and effectual in this court.

Finch v.
Finch, 2 Ves.
439. D.C.

Demurrer to a bill against the *East India Company* and their secretary, praying a commission to examine witnesses in *India*, and that defendants might *discover* by what authority plaintiff was dispossessed of a lease for supplying *Madras* with tobacco; (the plaintiffs intending to bring an action) over-ruled; and in the argument of this case, on the part of the plaintiffs, a case before Lord *Bathurst* was cited, which was a bill filed for a commission to examine witnesses in *India* to prove an assault committed by Mr. *Verelst*. The action was not commenced, and the defendant demurred, but it was then held that the circumstance of the action not being actually brought, was immaterial; and the reason that the demurrer was allowed was because the court would not compel a discovery of criminal matter. So in *Wych v. Mead*, 3 P. Will. 310. it was held, that the servant of a public company should not demur to a bill of discovery of papers and orders, as the company cannot be indicted for perjury, if their answer is false.

Moodamay
v. Morton
and the East
India Com-
pany, 1
Brown's Ch.
Rep. 469.
Trin. 1785.

But a distinction has been taken, that if a bill be brought for discovery of writings in general, there can be no demurrer to such bill for want of an affidavit annexed; but if a bill be brought for

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for the discovery of a particular deed or bond,
for which there is a proper remedy at law, then
such affidavit must be annexed to the bill.

3 Chan. Rep.
62. Chan.

Cas. 11. 231. Ver. 59. 180. 247. S. P.

A bill was brought by the purchaser of a rent-charge against the owner of the land, which rent-charge had been evaded by lease and release, stating that the deed was in the defendant's custody, or lost, and praying a discovery and a decree for the rent. Plaintiff proved that the lease and release had existed, and proved a draft of it, which was admitted as evidence, there being some grounds to think the deeds in defendant's custody: but the defendants being purchasers under a marriage settlement, Lord *Hardwicke* would not relieve them in equity, but left them to their remedy to try their right to the rent, either in the name of the plaintiff or trustees; or whoever had the legal right and estate in the rent; and said in this case that the loss of a deed is not always a ground to come into equity for relief, although it is for discovery; there are two grounds for it. First is, where the deed in question is destroyed or suppressed by the defendant; second, where the plaintiff cannot recover at law for want of property, as upon a lost bond.

1 Ves. 394.

If a bill be brought for having deeds set forth and deposited in the hands of the clerk in court, this is matter of discovery; but if the bill prays that the deeds may be deposited with a Master for safe custody, this is a matter of relief and not of discovery, and a decree must be had for that purpose; though in that case there is no occasion to make the usual affidavit, that the deeds are not in your custody; that being only necessary

cessary where the remedy is properly at law, and you come upon some equity to transfer the jurisdiction from law to equity; and here the court of Chancery, and not of law, has the jurisdiction; for the deeds cannot be deposited with a Master without a decree, and not upon a motion only. And if a man who has filed a bill for such discovery and relief, afterwards sells the estate to a purchaser before the decree is had, the purchaser may go on with the cause in order to have the deeds deposited in the name of the vendor, or he may bring a supplemental bill in his own name to have the benefit of the former proceedings, and for a decree; and although upon a bill of discovery the plaintiff only must pay the costs of the discovery, yet upon praying the above relief the plaintiff is not obliged to pay costs, but the costs are discretionary.

When a plaintiff has a right to come into equity for a discovery of deeds in the hands of the defendant, and he brings his cause to a hearing, the court will not dismiss the bill before trial in ejectment; for if the bill should be dismissed, and the plaintiff should recover in the ejectment, an injustice would be done him, as he would be entitled to an account of the rents if he had any ground of equity to come into this court:—Retain the bill for twelve months, and let the plaintiff bring his ejectment, or else the bill will be dismissed with costs.

Per Lord
Bathurst,

Nunton and Layman, 25th March 1772. Note, How far the receipt ought to be carried back, vid. Dorner and Fortescue, 3 Atk.

Whenever a bill is for a discovery only, and the plaintiff has a full discovery by the defend-

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Vid. statute
4 and 5
Ann. c. 16
sec. 23.
Bunb. 12.

ant's answer, the plaintiff cannot reply or proceed; for by the discovery the plaintiff has obtained the end of his bill, and when he has had the benefit of it in an action at law, and comes after to dismiss the bill (which he must do, or the defendant will), such dismissal will be with costs to be taxed; which seems hard, since the defendant was the occasion of this bill by his false plea below, and the plaintiff then can be allowed no costs in equity.

An executor brought a bill for a discovery of the defendant's marriage. Defendant demurred, for if she discovered, it would be a forfeiture of a legacy of 1500*l.* given her if she married without consent.

Lord *Hardwicke* allowed the demurrer, as she cannot answer to the marriage without shewing that the same was against consent.

But a case was cited where a husband by will gave an estate to his wife whilst she remained a widow without a *limitation over* in case of her second marriage; and she demurred: but Lord *Talbot* over-ruled the demurrer, as it was not a *condition* but a *limitation over* of an estate, and therefore could not be called a forfeiture.

2 Atk. 393

On a bill to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, for that he cannot set this forth without disclosing the very interest he has taken.

Ibid.

So a demurrer will lie to a bill brought to discover whether there is such a person, or where he is, in order only to make him a party.

Ibid. 394.

Bills brought in this court and in the Exchequer for discovery of waste, and demurrer in both courts, because the plaintiff had not waived the penalty.

Ibid. 393.

A defendant is not compellable to answer so as to subject himself to ecclesiastical penalties. But he must answer whether he has a legitimate son ; but not whether he is married or no, or whether he is an alien.

2 Vef. 493^h

If a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed, the plaintiff need not make oath of the loss of the deed, because he could have no remedy at law, though the deed was in his hands.

Mof. 192.
pl. 104. in
margin.

A bill proper for a discovery only prayed relief also ; the defendants put in a general demurrer, and upon argument the same was overruled, but without costs.

Fry v. Penn
and others,
Brown's Ch.
Rep. 280.
Mich. 1787.

But in a subsequent case, where the bill was for discovery and relief, in a case where the plaintiff was entitled to a discovery only, the defendant demurred generally ; and the Lord Chancellor, after a very slight argument, that such demurrer was irregular, and that it should have been a demurrer to the relief only, allowed the demurrer, saying, he had had occasion to consider this subject very much lately, and that he thought it incumbent on the plaintiff to shape his bill according to what he had a right to pray.

Price v.
Jamer, *ibid.*
Mich. 1787.

A cause being brought to a hearing, where the bill was for a discovery only, the question was, Whether the bill should be dismissed, or the cause struck out of the paper ? and his Honour the Master of the Rolls ordered the cause to be struck out of the paper, because a bill is never dismissed where the plaintiff prays no relief ; for the words of a dismissal are, The court seeing no cause to relieve.

Mof. 185.
pl. 95. Anon.

2 Vef. 389.
245.

No man is obliged to discover what *may* subject him to a penalty, not what *must* only.

Where a bill is brought (for discovery of concealments of a bankrupt's estate, the court will not allow the defendants to look into their depositions taken by the commissioners before they put in their answers.

Atk. 289.

Of Bills not Original.

C H A P. I.

Supplemental Bills.

IT has been already observed, that any alteration of the bill before the cause is at issue is done by way of amendment; but when new matter happens pending the suit, and after replication, or that the cause is at issue, which matter it is necessary for the plaintiff to set forth to the court, he may have leave to file a supplemental bill.

So that a bill altered before the cause is at issue, is called an amended bill. If any addition or alteration be made after, it is by another bill called a supplemental bill, which must shortly recite the former bill, and add, alter, or supply, what is necessary to the former proceedings.

Supplemental bills therefore are brought upon discovery of any new matters since the original bill and answer, and other proceedings had in the cause, in order to supply the defect of some former proceedings, when it is too late to amend the same; for it is a constant rule, that matters subsequent to the original bill must be brought before the court by way of supplement.

Supplemental bills are brought either before or after hearing. When it is after hearing it recites the former proceedings, and the state

Brown and
Higden, 1
Atk. 291.

of the cause, and then, by way of supplement, adds the new matter, and prays process as in an original cause.

When a supplemental bill is brought after publication, the court never gives the party leave to examine any thing that was in issue in the former cause, by reason of the manifest danger of subornation of perjury; and it is irregular to examine witnesses to a matter that was in issue, and not proved in the original cause; and such proof is not to be read.

So if there be no proof of the new matter in the supplemental bill, it must be dismissed, unless such matter is fully admitted in the defendant's answer.

But for matters of account there may be a supplemental bill after publication, because matters of account are examinable before the Master after publication; and this is from the necessity of the thing, because the charge or discharge must be made up privately before the Master; and so likewise a supplemental bill may be for any fact discovered after publication passed that was not in issue in the same cause, and where such fact varies the decree; but after the decree is pronounced and inrolled, it must be by bill of review.

Gilb. For.
Rom. 109.

Ord. Chan.
126.

On a supplemental bill the court upon motion will give leave to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplemental matter.

Or I think you may file a replication to the defendant's answer to the plaintiff's supplemental bill, and obtain an order that service of a *subpœna* to rejoin returnable immediately, on the defendant's clerk in court may be deemed

ed good service on the defendant; and then draw interrogatories to examine your witnesses touching such new matters contained in your supplemental bill, in case the defendant has denied the same in his answer.

Supplemental bills are often brought even in aid of a decree of this court, as in a decree for an account, for want of full directions before; and directions are given under the supplemental bill, that the same matter should be connected with the former decree; for the supplemental and original bill ought to be considered as one bill and connected together.

A. brings a supplemental bill, containing new matter discovered since the filing of his original bill, and a decree pronounced thereupon (but not signed and inrolled), and at the same time a petition of rehearing, in the nature of a bill of review, praying that the former decree may be rectified in the particulars complained of by the supplemental bill. Though this method is not of very long standing, yet there have been some precedents of it, (for instance, one in Lord Talbot's time, and two in the present Chancellor's;) and it is of itself a reasonable thing that this method should be allowed of where the decree *is not signed and inrolled*. It is founded upon reason, because if A. should be forced to sign and inrol a decree which he thinks himself aggrieved by, and then to bring a strict bill of review, it would only tend to increase expence and vexation; whereas the method which A. has taken attains the justice of the case as fully as the other would. Indeed this method should be put under some restriction as well as the other: and as in the other method, (viz.) of bill of review, A. must an-

Barnard.
Rep. 463.
468. 2 Atk.
177.

2 Chanc.
Rep. 142.
3 Ver. 135.

nex an affidavit to such bill, setting forth that the matter on which he founds his relief has come to his knowledge since the time of the decree, so it is fit that an affidavit of this sort should be annexed to the supplemental bill; but, according to former precedents, that has hitherto not been required, and therefore it cannot be insisted upon in this case.

A supplemental bill may be exhibited for discovery of more evidence. In a bill of review a new supplemental bill may be added.

A supplemental bill must state the original bill, and the proceedings thereon, and in general it must pray that all the defendants may appear and answer to the charges it contains. For the cause must be heard upon the supplemental bill at the same time that it comes on to be heard upon the original bill, if it has not been heard before; and if the cause has been heard before, it must in general, if not
3 Atk. 217.

always, be heard upon the supplemental matter. If indeed the alteration or acquisition of interest happen to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited against such a person alone, and may pray a decree upon the particular supplemental matter alledged against that person only, unless, which is frequently the case, the interests of the other defendants may be affected by that decree.

Ibid.

Where a supplemental bill is merely for the purpose of bringing formal parties before the court, the parties to the original bill need not be made parties to the supplemental bill.

Where a supplemental bill is brought for any new matter discovered since the hearing of the cause, before the decree is signed and inrolled,
if

if the defendant to such bill is able to show there is no new matter discovered, he must take advantage by plea or demurrer, and it is too late to insist upon it at the hearing.

2 Ark. 49.

C H A P. II.

Bills of Revivor.

BILLS of revivor are brought to revive suits and all proceedings thereon abated.

And the *subpœna* to revive is obtainable only by the heir, executor, or administrator, who come in in privity, that is, in immediate representation to the party litigant deceased; for a devisee or assignee of any plaintiff cannot have a *subpœna* to revive after the decease of such plaintiff; and one of the reasons given is, because, where the party devises or assigns his interest, and dies, if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition; and therefore he must bring his original bill, and make the heir or executor a party.

With respect to an abatement by the death of parties, it must be by the death of such as were so materially concerned in interest, as to make it necessary to have their representatives before the court, before the cause can be finally determined.

If the plaintiff dies pending a suit, it is abated, and his executors or administrators must revive

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revive the cause before the same can be further proceeded upon; and all the orders for the revival of the proceedings must be served upon the adverse clerk in court, to the end that he may take notice that the suit is revived.

So if a defendant dies, the suit is abated; and if it is a personal demand against him, the bill must be to revive and answer against the representative of such defendant, and the *sub-pœna* accordingly; and this bill prays either an admission or discovery of assets from the legal representatives of the deceased party.

It is generally held, that if the executor or administrator of a deceased defendant admits assets sufficient in his hands to answer the demand in question, this is sufficient; but in some cases the court will not allow it to be so, though this rarely happens. Indeed if the heir or executor sets forth the yearly value of the real estate subjected to assets, this is sufficient; because the real estate cannot run away: but with respect to the admission of personal assets, it may be in the power of the party to waste or run away with them; for in this case nothing but the person of the party is at stake; and there may be cases when two executors are appointed, and one refuses to act, and the other, who is insolvent, possesses the whole estate or assets. And therefore when any of these cases appear to the court, and when the party who possesses the assets is in dubious circumstances, it is no new thing for the court to oblige him to set forth the assets in specie, to the end that the plaintiff may pursue and follow them, and know where they are, and how to be come at when he
wants

wants the same. But this rarely happens, and is only done in extraordinary cases.

But query, whether the court can, strictly speaking, oblige any executor to give security to answer the debts; for it was the testator who made him his executor, and appointed him to stand in his place, and if he wastes and runs away with the assets, it should seem in strictness there is no helping of it: at the same time it must be admitted, that cases may be found where the court will lay their hands upon the assets.—Idep query.

If two joint tenants exhibit their bill, and one releases, this will not abate the suit as to the other. 2 *Freem.* 6. seems of tenants in common, for a right descends to their representatives.

Where a suit abates, it is said that the plaintiff may bring an original bill or bill of revivor at his election.

1 Ver. 399.

On a plea in abatement for want of proper parties, it is discretionary in the court either to dismiss the bill without prejudice, or to give leave to amend upon payment of costs of the day.

1 Will. Rep. 421. Sed vid. *contra*, Anon. 2 Atk. 15. Green and Poole, 4 Bro. Parl. C. 122.

The Attorney-general of the duchy exhibited an information at the relation of one part owner of coal mines against the other, the relator dies, this abates the suit *.

* Prec. in Chan. 13.—Note, it was held in this case that outlawry in the relator was a good plea in bar of his suit.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor must plead *de novo*; for the first cannot be argued now †.

† Micklethwaite v. Calverley and Baker, Cas. in Eq. Temp. Talbot 3.

If the defendant's time for answering is out, the court will order proceedings to be revived. So though the defendant by his answer insists that the plaintiff is not intitled to revive; for this ought to be shown either by plea or demurrer; but if in such case it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree ‡.

‡ Harris v. Pollard, 3 P. Will. 348.

There

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There is no answer absolutely necessary to a bill of revivor, for the cause will stand revived without any answer, because the *subpœna* brings the representative into court, and being there, upon motion, after the return of the writ, the cause shall stand revived against him; for when the heir does not show any thing to the contrary, the appearance of the ancestor by the attorney continues to him, as if there had been no demise; but the defendant may, for his benefit, put in any plea or answer, and shew that he is not heir, or has not the like interest, or that there is not the same cause of complaint against him.

The bill of revivor must pursue the original bill, because otherwise it is not a revivor of the same suit; and if there be a variance between that and the original bill in any material point, the defendant may demur, and upon such demurrer the bill of revivor shall be dismissed; but if there be any new matter arising by the abatement as assets in the hands of the heir or executor, the bill of revivor may pray a discovery, and a *subpœna* to revive and answer, in which case the defendant must answer thereto.

A cause cannot be revived in part, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived, for the revivor is but a continuance of the same suit; and it cannot be a continuation of the same, unless it proceeded where the other left off.

Proceedings in cross causes are not revived without a bill of revivor in each, because each plaintiff is master of his own cause; and therefore if the plaintiff revive against the heir of the defendant, that does not make it necessary that the heir of the defendant should revive
the

the cross cause against the plaintiff unless he pleases.

If an executor or administrator on a bill of revivor, by answer, admit assets, and the plaintiff, upon coming in of such answer, revives his suit (which is always done of course, by order of court), and proceeds in the original cause upon the revivor, he must not afterwards refer the answer for insufficiency; for this he ought to have done at first, before he proceeded to revive the original cause; and his doing thereof was an admission the answer was full and perfect, or otherwise he might have excepted thereto, but then he could not proceed to revive till he had got over that point.

If a feme sole answers, and afterwards marries *pendente lite*, this does not put the plaintiff under a necessity to revive the proceedings, because she, by her own act, cannot alter the condition of the plaintiff's suit, but by leave of the court the husband may be made a party; and if in such case the plaintiff brings a bill of revivor, it shall be dismissed with costs, because no suit can be revived that was never abated.

But if a feme plaintiff marries, here by her own act she abates the suit, because she has no power to continue any judicial proceedings; for by the marriage it is transferred to the husband; and therefore the husband cannot exhibit his bill of revivor to recontinue the suit; but in the former case, the husband took her with the suit attached to her; so note the difference.

If a bill be exhibited against baron and feme, and the husband dies, the suit is abated, and a bill of revivor must be exhibited against the wife,

wife, because she is not obliged to abide by the answer which was put in under the power of the husband.

But query,
if the suit
had been of
an inherit-
ance *jure*
uxoris, 2
Ver. 249.
3 Chan. Caf.
40. Toth.
24.

But if a man and his wife are plaintiffs, and the defendant answers, and the husband dies, the wife has it in her election whether she will exhibit a new bill or proceed on the old one by revivor; for she may change her cause of complaint at her election, because the former suit was commenced when she was under the direction of the husband.

When baron and feme are plaintiffs touching a promise made to them to make them leases for their lives; if the wife dies, the husband need not revive, because he claims in his own right and not in right of his wife.

3 Will. 195.
Thompson's
Cafe. Vid.
also Cro.
Car. 97. 1
Ver. 400.

A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which in strictness the suit abated, but the witnesses were examined before notice of the plaintiff's death; the examination was held regular, as well in regard to one of the witnesses that was dead, as to another that was still living.

The plaintiff's death, after a bill of interpleader, abates not the suit. Ruled on motion. 2 Ver. 351.

Though by the death of the *cestuy que* trust the suit abates as to him; yet if there be a decree against him and his trustees to convey, the trustees are obliged to convey, for the death of either party makes an abatement only *quoad* himself.

If there be several plaintiffs, and the defendant dies, some of them may proceed without the rest to revive, because the obstinacy of some of the parties shall not hinder the rest from asserting

asserting their interest : but it seems proper to make such former plaintiffs defendants, that they may be concluded in interest for not joining ; and a defendant may bring a bill of revivor as well as a plaintiff.

The court will order money out of court to a person intituled by a decree, notwithstanding the death of some of the parties.

Eq. Caf.
Ab. between
Finch and
Lord Win-
chelsea.

On a devisee's bringing an original bill in nature of a bill of revivor, he shall have the same advantage as an heir or executor ; and the defendant is not at liberty to make a new defence, or dispute the validity of the decree.

2 Ver. 548.
Vid. also 1

Ver. 283. where it is said, an assignee may revive by *scire facias* ; and vid. 1 Ver. 426. contra. Vid. also 2 Ver. 672. where it is said, a bill of revivor may be brought against a devisee ; but vid. Mosely 44. where the contrary is held by Lord Chancellor King.

So upon a bill in nature of a bill of revivor against a devisee, the devisee cannot dispute the justice or validity of the decree ; for then the devisee would be in a better case than an heir.

2 Ver. 672.

In a mutual account the defendant as well as plaintiff may revive ; and after a cause is heard, and decree pronounced, a defendant may in any case revive.

Slowel and
Cole ; Finch
and Lord
Winchelsea,
antea.

If an administrator obtains a decree, but dies before enrolment, the administrator *de bonis non* may revive the decree within the equity of the statute 30 Car. 2. c. 6.

By this stat.
it is enacted,

That an administrator *de bonis non* may sue a *scire facias*, and take execution upon a judgment had in the name of an executor or administrator. 2 Ver. 237. Owen v. Curzon.

If a plea of outlawry stands allowed, whereby the suit is put off *sine die*, and afterwards the outlawry is reversed, the plaintiff must bring

bring his bill of revivor, because that suit being abated, the defendant has no day in court, and therefore must be brought into court by a new *subpoena*.

If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendments remaining unanswered.

Upon a bill of revivor the defendants must answer in eight days after appearance, and submit that the suit shall be revived, or shew cause to the contrary; and in default, unless the defendant has obtained an order for farther time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course. The ground for this is an allegation that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in; it is therefore presumed that the defendant can show no cause against reviving the suit in the manner prayed by the bill.

Treatise upon Pleadings by English Bill, 72.

2 Eq. Ca. Abr. 3.

In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is intitled to revive.

A suit become entirely abated may be revived as to part only of the matter in litigation, or as to part only by one bill, and as to the other part by another. Thus if the rights of a plaintiff in a suit upon his death become vested, part

part in his real and part in his personal representatives; the real representatives to revive the suit so far as concerns his title, and the personal so far as his demand extends.

1 Eq. Cas.
Abr. 3, 4.

If the plaintiff revives against two only, when there were three defendants to the original suit, his suit will be dismissed.

Cary 78.
query.

A bill of revivor upon a bill of revivor lies until the interest of the thing in question be determined. Agreed *per Curiam*, especially in case of death.

Hard. Rep.
201.

If one be named a defendant in the original bill, who is yet alive, he ought not to be named in the bill of revivor, for the suit never abated *quoad* him: but if named in the bill of revivor only, he must be named in every bill of revivor after, because he was not named a defendant in the original bill.

Ibid.

A bill of revivor may be brought either before or after hearing; it is sometimes brought to revive only, and then it is revived without answer, after appearance upon motion, suggesting that the time for answering is out. But where it is brought to revive, and answer, an attachment and all the subsequent process of contempt may issue as on any other bill, if the defendant answer not in time.

If there be more plaintiffs than one, and one dies, the rest may proceed without reviving.

But part of the matter being omitted in drawing up the decree, a bill of revivor lieth to revive those matters, and this case went to the whole decree.

1 Chan. Cas.
37.

A bill of revivor was brought to revive all proceedings, and particularly an order by consent; the defendant demurred to the bill, for that is sought to revive that order, whereas the

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feme was a party to it, and she being married since her executorship, consequently her consent was determined; and the demurrer was allowed.

1 Chan. Caf.
77.

Prec. in Ch.

197. Vid.

also 1 Will.

263. 1 Eq.

Abr. 2.

3 Atk. 691.

Barnard.

Rep. in Ch.

85.

1 Vern. 308.

After a decree to account, and an abatement by defendant's death, his representative may revive, both being in nature of plaintiffs.

The court may direct the suit to stand revived without taking out a *subpœna* to that purpose.

In case of abatement it is not necessary to revive against a defendant that has not answered.

Plaintiff brings a bill of revivor, defendant pleads a former bill of revivor; if that plea is not sufficient for some special circumstances in the case, the court will order the cause to stand revived without *subpœna*.

Barnard.
Rep. 81.

Mortgagor brings a bill to redeem, an account is decreed, a report made, and divers proceedings are had in the cause, and the plaintiff is ordered to pay costs, and deliver possession. The defendant (the mortgagee) dies, his executor may revive the suit, and have the benefit of the order for costs.

2 Vern. 296.

An executor (his testator dying after publication) is not permitted to exhibit a new bill upon that matter whereby to make further proofs, but is to hold to a bill of revivor, and so proceed upon examinations so published in his testator's life-time.

An injunction bill may be revived.

4 Vin. Abr.

432. pl. 17.

3 Atk. 690.

pl. 260. Vid.

also 2 Brown

Chan. Rep.

127. Hen-

derlon v.

Meggs.

He who claims only as heir by proviso, or *per formam doni*, cannot revive, but must bring his original bill in nature of a bill of revivor.

Bill of revivor may be taken *pro confesso* against an absconding defendant under statute

5 Geo. 2. c. 25.

On bill of revivor plaintiff cannot dispute a decree, though the defendant may.

2 Vef. 232.

Though by the stat. 8 *Will.* 3. a suit shall not abate by the death of one defendant, yet it must be taken with this restriction, that the subject matter of the bill is not hurt by such defendant's death.

1 Atk. 297.

No bill of revivor can be brought when it relates to costs only, unless the costs are taxed, and a report made in the life-time of the party; for this is a personal action, and dies with the party. But if by the decree the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deeds or writings, or if any thing is annexed to the decree besides costs, the suit may be revived, but it can never be revived for costs only.

2 Ch. Caf.
7. 2 Chan.
Rep. 195.
246. But if
he dies after
they are
taxed, then
it may.

But in a plea to a bill of revivor in a case where nothing remained but the matter of costs, which had been ordered to be paid into the Bank, and being unpaid at the time of the death of the party, the question was, whether a bill of revivor would lie against the representative; and in support of the plea it was argued, that when the party who is to pay costs dies, it is a personal debt, and dies with him, unless the costs are ordered to come out of a particular fund, although when the party who is to receive the costs dies, his representatives shall have his remedy against the party decreed to pay: On the part of plaintiff it was objected, that this doctrine held only where the costs were not taxed, but that as soon as the costs were liquidated, the debt was become certain, and it was proper matter for a bill of revivor and supplement.

Brown's Ch.
Rep. 438.

Hall v.

Smith, Hil.
Term 1785.

Vid. also

2 Vef. 461.

ibid. 465.

ibid. 579.

3 Atk. 812.

ibid. 772.

The Lord Chancellor thought the circumstance of the costs having been ordered to be paid into the Bank, took this case out of the general rule, and made it certainly matter of revivor, and therefore over-ruled the plea.

It is an universal rule, that whenever a death happens, and yet the right survives, and the cause is in the same plight and condition after the demise as it was before, there is no need of the revivor, because no other person is to be sent for, nor any other person to be made party to the complaint.

But where the right does not survive, or there is any alteration by the death of any of the parties, there you cannot go on without revivor, because there will not be proper parties, unless all parties in interest be before the court; and if there be an alteration by death, all parties cannot be before the court, unless the representatives of the deceased be brought before the court.

If an executor *durante minore etate* exhibits a bill, and the infant comes of age, no bill of revivor is necessary, because it is a continuation of the same representation. So it is where a bill is brought by joint tenants, co-executors, joint-obligors or obligees, and one of them dies; the survivor need not revive, because the right survives to the other.

But query; and vid. the case of Jones v. Russell, Prec. in Ch. 175. where it was held that an in-

fant in such a case must begin anew, unless a decree to account was had; vid. also 2 Vern. 237. 2 Eq. Caf. Abr. 3, 4. where, in the case of an administration determined by death, a bill of revivor by a subsequent administrator has been admitted.

A feme sole exhibited her bill and marries, the defendant answers; and after would have taken advantage of the plaintiff's proceeding without

without revivor : It was ordered, that the defendant should be examined upon interrogatories, whether before his answer he knew of plaintiff's marriage ; and if so, then the plaintiff to proceed without revivor.

C H A P. III.

Of a Supplemental Bill in the nature of a Bill of Revivor.

IN a decree to account, if during the account any party should die, and a devisee of that party, or any other formal party as trustees, should be wanting, a bill to bring them before the court is not in the strict sense a supplemental bill, but a supplemental bill in the nature of a bill of revivor ; and to such bill it is not necessary to make the defendants in the original bill parties, nor when the cause comes on to be reheard, can those defendants object for want of parties.

3 Atk. title
Bankrupt,
217.

Bills in the nature of Original Bills.

C H A P. I.

Of Cross Bills.

A CROSS bill is a bill brought by the defendant against the plaintiff in a former bill depending, touching the matter of such bill, or the facts set forth in the defendant's answer to the plaintiff's original bill.

It is in nature of a defence, and was first allowed, that the party might state his own case more to his advantage than he could by his answer.

Mosely 382.

It must be brought before publication is passed on the first bill, and not after, except the plaintiff in the cross will go to hearing upon the depositions already published, because of the danger of perjury and subornation, if the parties should, after publication of the former depositions, examine witnesses *de novo* to the same matter before examined unto.

Nelf. Chan.
Rep. 103.

When a cross bill is put in, both causes commonly proceed to be heard together, which cannot be if one bill be filed after publication in the other cause, unless such last cause is heard on bill and answer. But if there be cross causes, and publication is passed in both, and one of the plaintiffs omits to serve *subpoena* to hear

hear judgment, his cause shall not come on at the same time with the other, except the other party consents.

Where there are cross bills, the defendant in the first bill must generally answer before the defendant in the last shall be compelled to put in his answer; as where A brings his bill against B and C, who put in insufficient answers, and prefer their cross bill against A. B becomes a bankrupt, his assignees bring their bill in nature of a bill of revivor against A; P. Will. 266. Vid. also 2 P. Will. 435. they shall not go on till C has answered A's bill: and by the course of the court the plaintiff in the last bill cannot have process of contempt against the other till eight days after his answer is put in. 3 Atk. 724. 1 Atk. 266. Long v Burton, 2 Atk. And in case the plaintiff in the last bill should attempt to take out process of contempt, the defendant may obtain an order that he may have a week or a fortnight's time to put in his answer to the cross bill, after the defendant has put in an answer to the plaintiff's original bill.

Lord *Hardwick* desired it might be observed, that in all cases of a cross bill after the original cause was proceeded in, motion to enlarge publication should be special, on notice to the other party, that the court might judge of the propriety of granting such motion on circumstances shewn in support of it; and that such motion should not be of course, as it is in cases where the original cause is not proceeded in, for otherwise it would be easy to delay hearing by that means.

2 Vef. 36.

It was laid down as a general rule, that where a defendant in a cross cause, but plaintiff in the original, is in contempt for not putting in an answer, the proper motion is to enlarge

large publication in the original to a fortnight after the answer is come in to the cross bill; and it is irregular to move to stay proceedings in the original cause till such answer comes in.

1 Atk. 291.

If after a cross bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendment at the same time with the original bill, he waves his priority of answer to the original.

2 Atk. 218.

Vid. also P.

Will. 435.

Steward v.

Roe.

In general, a defendant to an original bill, who afterwards files a cross bill, is not to be allowed his costs in the first cause, till the merits of the cross bill are determined; but where a bill was brought to prove a will *per testes*, and to perpetuate testimony of witnesses, the defendant cross-examined the plaintiff's witnesses, but did not examine any of his own; and afterwards brought a cross bill to set aside this will; the defendant in the original cause moved, that the plaintiff might pay him his costs: and it was said by the Lord Chancellor that he was intitled to have the benefit of his motion; and said that he had no other way in this case to have his costs than by moving for them.

3 Barnard.
334.

A cross bill should state the original bill and proceedings thereon, and the right of the party exhibiting the cross bill, or the ground upon which he resists the claims of the plaintiff in the original bill.

If there be a bill exhibited in one court of equity, there may be a cross bill in another, as if the mortgagor exhibit a bill to redeem in the Exchequer, the defendant may bring a bill

1 Vern. 221. in Chancery to foreclose.

A cross

A cross bill being generally considered as a defence, or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court.

The court will frequently, in cases of difficulty, direct a cross bill to be filed, in order to bring the rights of all the parties fully and properly for its decision.

² Ch. Caf.
^{248.} ³ Atk.
^{110.}

C H A P. II.

Of Bills of Review.

As to Bills
of Review,
and the rea-
sons for ad-
mitting
them, vid.
²⁷ H. 8. ^{15.}

THE object of a bill of review is to procure an examination and reversal of a decree made upon a former bill, and signed by the person holding the great seal; and it may be brought upon error of law appearing in the body of the decree itself, without averment or further examination of any matter of fact before the decree, or of any matter resting upon record which might have been had at the time of the decree, or it may be exhibited by leave of the court upon the discovery of any new matter.

When a decree then is inrolled, it can never afterwards be altered without a bill of review, unless there be an apparent error in casting up the sums upon the face of the decree; for that being a mere mistake of the officer in drawing up the decree, and a matter demonstrative, it may be rectified upon motion without a bill of review: so likewise if some part of the decree be omitted in the inrolment, such omission, for
the

the like reason, may be corrected upon motion.

If a bill of review be brought to reverse a decree signed and inrolled upon discovery of some new matter, in such case the plaintiff in the bill of review must obtain the previous leave of the court for filing such bill; but if the bill be founded upon error of law apparent upon the record, no such previous permission of the court is necessary; and this has always been understood to be the rule, and the course of proceedings shows it; and the leave of the court is never obtained in the first instance, but upon allegation upon oath that the new matter could not be produced or used by the party preferring this bill at the time when the decree was pronounced: and the court, upon the new matter being discovered, will decide upon its relevancy or irrelevancy, and permission to file a bill of review will accordingly depend upon such decision.

When a bill of review is brought for error apparent upon the record, the constant method is for the defendant to put in a plea and demurrer against opening the inrolment; and an answer is rarely required, unless the same is ordered by the court: so that in effect a bill of review cannot be brought without leave of the court in some shape; for if it is founded upon matter apparent in the body of the decree, then upon the plea and demurrer of the defendant to the bill, the court judges whether there are any grounds for opening the inrolment; but if it is for matter come to the plaintiff's knowledge after pronouncing the decree, then, upon a petition for leave to bring a bill of review,

the

the court will judge if there is any foundation for such leave. 1 Atk. 534.
Vid. also
Pract. Reg.
51. 1 Vef.
430. 432.
1 Vern. 416.
418.

With respect to the materiality of the new matter discovered (and which has been observed to be one of the grounds upon which a bill of review is founded), the court has not pursued a very rigid system of construction; and it is said, that it is not necessary there should be a certain and positive evidence as to the finding of deeds after a decree, which if discovered would have varied the decree; but such evidence only is necessary as the court may think reasonable; for there is no rule of evidence laid down in this court but a reasonable one, and such as the nature of the thing that is to be proved will admit of; and with respect to the time of the discovery of the new matter, the construction of the court has not been so strict that the new proof must not come to the knowledge of the party till after the cause has been heard; it is very sufficient if it did not come to his knowledge till after publication, or at any time when, by the rules of the court, the party could not make use of it. Ibid. 40.

3 Atk. 35,
36, 37.

But note, if it came to the knowledge of the party's solicitor, attorney, or agent, before the cause was heard, it is considered as notice to the party himself; and though a country attorney acts by an agent in causes in this court, yet he is to be considered as the solicitor in the cause, though he resides in the country, and what is known to him is considered as constructive notice to his client. Ibid.

It is a rule of the court, that the bringing a bill of review shall not prevent the execution of the decree impeached; but, on the contrary,

trary, that obedience is actually to be paid to the decree as far as it can be paid without prejudice to the right of the party preferring the bill of review; as where the decree directs the possession of lands or of writings to be delivered up, the same ought to be done; so if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded.

2 Brown P.
C. 24. Note. Toth. 42. 1 Chan. Caf. 42. 86. 1 Chan. Rep. 139. 2 Chan.
Rep. 48.; and note, if money is decreed to be paid, the court will some-
times accept of good security to await the event of the bill of review. Pract.
Reg.

But if the decree requires an act to be done which would extinguish the party's right at common law, such as conveying lands, releasing a debt, acknowledging satisfaction, cancelling evidences, &c. the execution of these parts of the decrees (which if obeyed would prove perhaps highly detrimental to the rights of the party) will be stayed upon an application being made to the court; and upon good and substantial cause being shown why the execution of the decree in certain particulars should be stayed until the bill of review be determined, an order of court may be obtained for that purpose. So if a decree, or any part of it, be in the nature of things impossible, it is erroneous, and will be reversed upon a bill of review; so-if it be repugnant.

1 Ch. Caf.
42.

Ibid. 87.

As in the case of bills of revivor, so also in bills of review, none but such as are parties and privies can commonly bring them; but in some cases where a man's interest is affected, or he is grieved by a decree, he may have this bill; as where a parish was sued, and four of
the

the parishioners named only to defend, another parishioner may bring this bill : but a devisee is not intitled to bring a bill of review of a decree against the testator, not being in privity to him.

1 Ch. Cal.
272.

As the end of a bill of review is to reverse a decree formerly made, in order to proceed therein, a copy of decree after it is signed and inrolled is first to be procured, and the bill (having recited the former bill, proceedings and decree, as the same are recited in the decree signed and inrolled) must state the case of the party preferring it, and the point in which he conceives himself aggrieved, and the reasons why the decree should not be binding upon him, but reversed as for error in law, or on the ground of the new matter discovered ; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery, though it may be doubted whether, after leave given to file the bill, that fact is traversable *. The bill may conclude with praying that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the further decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed, and lastly, a writ of *subpoena* to appear and answer.

* Hanbury
v. Stevens,
Trin. 1784,
in Chan.
In this case,
which was
upon a supplemental
bill in nature
of a bill
of review,
the court
seemed to be
of opinion,
that the fact

of the discovery was traversable, and not being admitted by the defendant, ought to have been proved by the plaintiff, to intitle him to proceed at the hearing of the cause, Treatise upon Pleadings by English Bill 30, in notes.

Upon

Upon every bill of review, whether the same be founded upon error in law apparent upon the record, or upon some new matter discovered subsequent to the decree, the plaintiff must deposit 50*l.* in order to answer costs, and a certificate thereof obtained, and to the latter bill the leave of the court is necessary as well as the depositing 50*l.*; and besides an affidavit by the plaintiff must be annexed to it, stating that such new matter was not existing at the time of pronouncing the decree, and that it came within his knowledge since the hearing, and of which he or his agents were not at that time apprised, and which could not be had or used.

2 P. Will.
283. anon.

Vid. Lord
Bacon's Or-
dinances,
Ord. 1.

2 Atk. 139.

2 Atk. 177.

534.

3 Atk. 26.

The court has allowed a bill of review where the same was filed without the previous leave of the court being obtained: as where the plaintiff having deposited 50*l.* and annexed an affidavit to the bill that the deed on which the bill of review was founded, did first come to the plaintiff's knowledge after the pronouncing the decree, the court allowed the bill of review, upon the plaintiff's paying the costs of the defendant's motion, which was to dismiss the bill, for that it was filed without the leave of the court.

2 P. Will.
283. anon.

1 Ver. 135.

Hard. Rep.

104. Vid.

also Treatise

upon Plead-

ings by Eng-

lish Bill, 81.

If the bill of review is brought to review the reversal of a former decree, it may pray that the original decree may stand; and if any person not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement.

The demurrer to a bill of review brought for error apparent upon the record, being set down to be argued, the court proceeds to affirm or re-

verse the decree, and the prevailing party takes the 50th. deposit.

Forgetfulness or negligence of parties under no incapacity, no foundation for a bill of review.

No objection to be made upon a bill of review that is not assigned for error. 4 Vin. Abr.
414 pl. 6.

Objections to a Master's report cannot be assigned for error upon a bill of review.

Bill of review cannot be brought after twenty years, though error appear in the decree. Chan. Caf.
382.

1 Brown's Parl. Caf. 95. 5 Brown's Parl. Caf. 460. 6 Brown's Parl. Caf. 395. Vid. also 3 Atk. 38. 39. ; but it has been said there is no limitation of time for bringing a bill of review, yet after a long acquiescence under a decree, Chancery will not reverse it, but upon very apparent errors. Per Lord Keeper North, Ver. 287. pl. 285.

No bill of review can be brought on a decree on the statute of charitable uses. Ch. Caf.
385.

In a cause that came before the court upon a bill of review to read some charges out of the original bill, the plaintiff offered to shew some errors in the decree. To this it was objected that no errors in the decree were cognizable, but what appeared on the face of the decree: and therefore any errors but from the decree itself were opposed.

Lord Chancellor: It is true on arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is over-ruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open. 1 Atk. 290;
Cotterell v.
Purchase.

No witnesses which were or might have been examined on the former bill, shall be examined on a bill of review; nor shall any new evidence or matter then in the knowledge of the party, and which might have been used before, be a sufficient ground for a bill of review. 3 Chan. Rep.
76. 1 Chan.
Caf 43. S. P.
2 Chan. Rep.
45. S. P.

It

² Chan. Rep.
45. S. P.

It has been insisted on as a rule, that nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be a ground for a bill of review to reverse a decree; and that a confession subsequent to the decree is no ground for a bill of review; nor is the want of any evidence or matter which might have been used in the first cause, and of which the party had then knowledge.

¹ Chan. Caf.
44, 45, 122.

But quare, if this account should be carried on, as the suit abated, without bringing a bill of revivor, and an order obtained for reviving the former proceedings.

An account was decreed, pending which the suit abated; and yet the account was carried on, finished, and confirmed by a decree, and held to be no error, or cause of reversal on a bill of review brought.

The plaintiff, who had a decree, brought a bill of review, and thereby complained, that he had not enough decreed him; and a demurrer being made thereto, for that if a bill of review lies, it is only for him against whom the decree is; and after a long debate the demurrer was allowed, and the bill of review dismissed; the party brought another, suggesting further errors; but this was also dismissed on the maxim, *Interesse reipublicæ ut sit finis litium*.

¹ Ver. 44.
¹ Ver. 417.
S. P.

If a man brings a bill of review, to which there is a demurrer, which is allowed, he cannot afterwards bring a new bill of review.

¹ Ver. 115.
² Chan. Caf.
133.

A bill of review lies not after a bill of review.

² Ver. 120.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled it cannot, so as to prevent the demurrer from being re-argued.

Proc. in Ch.
260, 261.

When error appears in the body of the decree drawn up and inrolled, the court will open the decree.

Plaintiff

Plaintiff was allowed to bring a bill of review without paying costs in the original cause, he swearing he was not worth 40*l.* besides the matters in question.

Ver. 261.

So a plaintiff was not allowed to bring a bill of review, unless he would perform the decree, or would swear he was unable to do it, and would surrender himself to the Fleet, to be there kept until the matter of the bill of review was determined.

Ver. 117.

Fine and non-claim is a good bar to a bill of review.

2 Ver. 190.

Appeal to the House of Lords from a decree in Chancery, and upon the petition of the appellants to examine witnesses in the cause, it was rejected, and the petition dismissed; the appellants then brought a bill of review, and it was decreed, that the defendants should either answer the bill of review, or demur on the errors in it, without costs on either side; and the benefit of the order of dismissal by the Lords was saved to the defendants.

Finch 469.

Bill of review and error assigned in the decree, plea and demurrer thereto; demurrer in part allowed, and in part over-ruled.

Finch 36.

A bill of review will not lie but against those who were parties to the original bill: as where *I. S.* mortgaged lands to *A.* in fee for 1000*l.* and covenanted and gave bond to pay the money, but forfeited. *A.* died, leaving *G.*'s wife his heir at law. *G.* and his wife brought a bill against *I. S.* for payment of the money, or else *I. S.* to be foreclosed, and it was decreed accordingly; *I. S.* did not pay the money according to the decree; but upon discovering that *A.* had made a will, and had given this money to his executor; *I. S.* brought a bill de-

2 Freem.
Rep. 148,
149.

siring that he might be admitted to pay the money to the executor, he having the right, and no party to the former decree; this was by original bill, and not by bill of review, because the executor was no party to the former decree.

2 Freem.
Rep. 182.
Chan. Caf.
54, 55.

Upon debate it was declared, that on a bill of review the cause of review must arise and appear upon the case, as stated in the decree, and that the *fact* must be admitted as there stated; and that though the *facts* whereon the court gave judgment, were mistaken, yet there is no ground for a bill of review after a decree inrolled, but the fact in this case must be admitted to be true, and the decree inrolled is matter of record, and can be tried only by the record; but in mistaking the fact the proper course had been, to have got the cause *reheard* before the decree had been signed and inrolled.

Ibid. 181.
Vid. Nelf.
Rep. in Ch.
83. Jackson
and Digby,
S. P. and
Jecus S. C.

The defendant had a decree for money. The plaintiff by bill of review reversed this decree, and the money decreed to the plaintiff. *Per Cur.* On searching of precedents the defendant shall not pay *damages* for this money; and compared to a judgment in a writ of error, where the judgment is, that the party shall recover *quicquid amisit per judicium prædictum*, but no damages or costs.

2 Freem.
Rep. 31.
Anon.

This difference was taken by the Chancellor where a matter of fact was particularly in issue before the former hearing, though you have new proof of the matter, upon that you shall never have a bill of review; but where a new fact is alledged, that was not at the former hearing, there it may be a ground for a bill of review.

It is a good plea in bar to a bill of review that the former decree is not executed; and it was said that though bills of review be in nature of
a writ

a writ of error, yet they are not favoured in equity; for upon a writ of error (and that only in some particular cases) one need only to give bail to pay principal and costs; but in bills of review the decree ought actually to be complied with, and, besides, there ought to be security for costs.

12 Mod.
343. 2 Eq.
Abr. 175.

A bill of review was brought and demurred to; and afterwards the plaintiff in the bill of review moved to dismiss the bill as not being regularly filed, upon payment of costs out of the 50*l.* deposited upon the filing thereof; and the same was granted.

Per Lord
Chan. Cow-
per, 4 Vin.
Abr. 415.
pl. 2.

The plaintiff's original bill was to settle boundaries of his manor; upon the first hearing, an issue was directed and a verdict found for plaintiff; and afterwards the cause coming on upon the equity reserved, there was a final decree for quieting plaintiff in possession, and defendant was to pay costs. The defendant then moved for leave to file a bill of review upon his *solicitor's* affidavit, "that *certain new evidence* was discovered in favour of the defendant since the verdict and decree." The question was, if the defendant should have leave to file the bill without first paying the costs decreed.

And *per Cowper* Chancellor, He shall not, for payment of costs ought to be performed rather than any other part of the decree*; and his Lordship thought the *party* himself should

* Sir Henry Lyddel v. Bishop of Durham, MS. Rep. 2 Eq. Cas. Abr. 176. Note, on the part of plaintiff a book of rules printed in 1623 was produced, wherein there was a rule *Temp. Bac. Chan.* and another in 1656, to the effect following: "That no bill of review shall be allowed till after the decree performed in all parts, unless such performance would extinguish the party's right or title at law;" and *per Chan.* "These old orders are reasonable and just, and ought to be observed;" and said by Lord Chan. Hardwicke, "That Lord Bacon's rules in respect of bills of review have never been departed from." 3 Atk. 26. *vid.* Lord Bac. Ord.

The Practice of the

make an affidavit that this new matter was discovered since the decree, and that the affidavit of a solicitor is not sufficient; for the defendant himself, or some *other* agent of his, might be informed of this matter before; at least if defendant by reason of his age, high station, and quality may be excused from making an affidavit of the particular matters and facts, yet at least he should have an affidavit to corroborate that of his solicitor; but this affidavit of the solicitor is not a sufficient ground for a bill of review, and therefore defendant must take nothing by the motion.

Ibid. in
notes.

Papers in the hands of a party to a former cause, *after publication had passed*, though not produced, they may be read upon a bill of review; for as they were not discovered till after publication in the cause, they could not possibly be of any use then.

2 Atk. 179.
Standish v.
Rudley.

C H A P. III.

Of supplemental Bills in the nature of Bills of Review.

IT has been already observed in the last preceding chapter, that a bill of review cannot be brought upon a decree signed and inrolled for new and supplemental matter in being at the time of making the decree, but discovered and come to knowledge afterwards, without making a deposit of 50*l.* and obtaining the leave of the court; so where a decree is neither signed nor inrolled, and any new matter has been discovered

2 Ark. 40.
Ibid. 139.

covered since the decree, the decree may be examined into and reversed upon a species of supplemental bill in the nature of a bill of review.

But no supplemental, or new bill, in nature of a bill of review, grounded upon any new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this court, in order to the reversing and varying of such decree, shall be exhibited without the special leave of the court first obtained for that purpose; and unless the party exhibiting the same do first deposit with the Register of this court, so much money, as, together with the deposit by the rules of this court to be made, on obtaining a rehearing of the cause wherein such decree was pronounced, will make up the sum of 50*l.* as a pledge to answer such costs and damages as shall be awarded to the adverse party; in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill.

Rules and
Orders in

Chan. 10th. 2 Atk. 139. 3 Atk. 811. 2 Vef. 571. 596. Note, If the decree had not been signed and inrolled they had got into a way of supplemental bills in nature of a bill of review, at large without deposit or leave of the court at all, and then brought a petition to rehear or appeal. This was growing into abuse, and several of them were brought for vexation: and to put these improper bills of review under the like restraint as the other, was the occasion of an order to that effect, made by Lord Hardwicke, 17th October 1741.

This bill in its frame nearly resembles a bill of review; except that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill; and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.

Treatise upon
Pleadings
by English
Bill, 82, 83.

C H A P. IV.

Of Bills in the nature of Bills of Review, to examine and reverse Decrees either signed and inrolled or not, brought by persons not bound by the Decree.

Treatise upon
Pleadings
by English
Bill 83.

IF a decree be made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill of review.

Thus if a decree be made against a tenant for life only; a remainder-man in tail or in fee cannot defeat the proceedings against tenant for life, but by a bill shewing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be revived; and for that purpose, that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without leave of the court.

Ibid. Vid.
also 1 Chan.
Cas. 272.

C H A P. V.

Of Bills impeaching Decrees upon the ground of Fraud.

A BILL in the nature of an original bill may be exhibited in this court for the purpose of impeaching and setting aside a decree obtained by fraud; and there are several instances of relief, notwithstanding a decree signed and inrolled, if the same has been obtained by fraud and imposition; for fraud infects judgments at law, and decrees of all courts, and annuls the whole proceedings, particularly in the consideration of a court of equity.

2 P. Will.
732, 74.
3 P. Will.
111. 1
Brown Parl.
Caf. 414.
2 Vcl. 120.

It has been held, that where an infant conceives himself aggrieved by a decree, he is not under the necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he bound to proceed by way of rehearing or bill of review, but may impeach a former decree by an original bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it.

1 P. Will.
737. Gaily
v. Baker.
Caf. Temp.
Talbot 201.
Wortley v.
Bukhead,
3 Atk. 811.

The plaintiff brought a bill to redeem, setting forth, that his late father being seized in fee of lands, made a mortgage thereof to *I. S.* and that the defendant desired the plaintiff's father would consent that this mortgage should be assigned to the defendant, who would help the plaintiff's father to a place, and be willing to take his interest out of the profits of the place.

N 4

That

That thereupon this mortgage was by the plaintiff's father's consent assigned to the defendant, who never helped the plaintiff's father to any place; but instead thereof, the defendant, the next term after the mortgage was forfeited, brought an ejectment against the plaintiff's father, and turned him out of possession; and the term next following, the defendant brought a bill against plaintiff's father, who put in an answer to the bill, and then the defendant got a common bailiff, one of a scandalous character, to make an affidavit that the plaintiff's father had left his situation, and (as he believed, and was credibly informed) was gone beyond sea; upon which affidavit, the now defendant got an order, that service of the then defendant's clerk in court might be good service; whereas the plaintiff's father was then living, and publicly appeared in the next county with his wife's relations; but upon this false affidavit, and an order made thereupon, the cause was heard *ex parte*, and the report made *ex parte*, and confirmed absolutely; by which means the plaintiff's father became absolutely foreclosed, although the estate was of much greater value.

The defendant pleaded this decree and report, and both made absolute, signed and inrolled.

Lord Chancellor: All these circumstances of fraud ought to be answered; which the defendant has been so far from doing, that he only pleads that decree and report as a bar, which the plaintiff seeks to set aside; and the decree being signed and inrolled, the plaintiff has no other remedy; and if these matters of fraud

fraud laid in the bill are true, it is most reasonable that the decree should be set aside.

Wherefore over-rule the plea, and let it not stand for an answer; and though it was objected, that according to this rule, a decree might be set aside by an original bill,

His Lordship replied, such a gross fraud as this, was an abuse on the court, and sufficient to set any decree aside.

There are many cases, though not of direct fraud, which a court of equity would construe to participate so much of the nature of fraud, that was this species of bill to be exhibited for relief in such cases, the same would be deemed a proper one; as where a decree has been made against a trustee, the *custuy que* trust not being before the court, and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or when a decree has been made in favour of or against an heir, where the ancestor has in fact disposed by will of the subject-matter of the suit.

In this bill the former proceedings and decree must be stated, with the circumstances of fraud used to procure the decree, and the prayer will necessarily depend upon the nature, quality, and extent of the fraud, and must be adapted accordingly to the circumstances of the case.

CHAP. VI.

Of Bills to carry Decrees into execution.

A BILL in the nature of an original bill may be brought to execute or confirm a decree, or to carry an act of parliament into execution,

2 P. Will.
74. Vid.
also the au-
thorities be-
fore cited.

Treatise up-
on Pleadings
by English
Bill, 84.
Vid. also
1 Ch. Caf.
151, 152.
3 Ch. Reg.
95.

execution, or to revive or enforce the performance of decrees; and a decree has been explained by matter subsequent; but may not be explained on a matter precedent to it.

So where after a decree, an original bill is become necessary, as in case the decree be of twenty or thirty years standing, or that the party neglecting to procure a stay of proceedings at law is ousted of his possession by judgment; there in such case the former decree may be set forth as evidence; but the court will not decree the same thing merely upon the foot of that decree, but will examine the grounds of the former decree before they make a new one.

2 Ch. Rep.
128.

An original bill to execute a decree of lands against a purchaser, who claimed under parties bound by that decree, has been allowed good on a demurrer put in by the defendant.

1 Chan. Caf.
231.

But if a bill be brought to have the benefit of a former decree, the plaintiff cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause; but on such a bill the court may examine the justice of the former decree, but then it must be by proofs taken in the cause wherein that decree is made. So said *per Curiam*.

2 Vef. 232.
6 Brown P.
C. 395. Vid.
2 Brown
P. C. 523.
1 Vef. 239.
Ibid. 218.
2 Ver. 209.

It is said, that no original bill ought to be brought to explain a decree on any matter precedent to the decree.

1 Ch. Caf.
45.

This bill may also be brought to carry into execution the judgment of an inferior court of equity, if the jurisdiction of that court is not equal to the purpose; as in the case of a decree in *Wales*, which the defendant avoided by flying into *England*; but in this case the court thought itself intitled to examine the justice of the decision, though affirmed in the House of Lords.

1 Ark. 408.
Treatise upon
Pleadings
by English
Bill 87.

Douglass 6.
100.

C H A P. VII,

Of Bills to suspend or put a period to the Operation of Decrees.

A BILL lies to put a period to a temporary decree; as where a feme covert, after separation from her husband, had a decree for alimony, which decree was confirmed on a bill of review; but the husband being willing to be reconciled to his wife, and to cohabit with her, exhibited an original bill to set aside the decree: and it was held by *Finch* Lord Keeper, assisted by *North*, Chief Justice, to be a proper bill; and said to have been resolved, that where a decree is temporary, or for special ends, an original bill lies, to shew that the purposes of the decree are satisfied, and to put a period to it.

1 Chan. Caf.
250.
2 Ch. Reg.
128.

So where a decree is to foreclose, the court will, in cases of necessity, enlarge the time for performance by payment of the money, and though the decree be signed and inrolled.

1 Ch. Caf.
64.

C H A P. VIII.

Of Original Bills in the nature of Bills of Revivor.

IT has been already observed, that a *subpœna* to revive is obtainable only by the heir, executor, or administrator, who come in, in privy, that is, in immediate representation to the party litigant deceased; but a devisee or assignee

Treatise up-
on Pleadings
by English
Bill 66, 67.

1 Ver. 427.
2 Ver. 548.
672. 1 Brown
Par. Caf.
529. 1 Eq.
Caf. Abr.
83.

assignee of any plaintiff cannot revive a suit abated by the death of such plaintiff; an original bill therefore in the nature of a bill of revivor must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representative of the deceased party in the one case, or of the assignee in the other, is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor.

Treatise up-
on Pleadings
by English
Bill 85.

A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party deceased has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it.

2 Ver. 548.

A devisee brings an original bill in the nature of a bill of revivor. The question was, whether the defendant shall be at liberty to make a new defence: Lord Keeper; Where the bill, although original, is only to supply the want of privity, and in all other respects but as a bill of revivor; I think the decree ought to be carried on in the same manner as it would have been upon a bill of revivor, if the plaintiff had claimed in privity. There is no reason why the devisee should not have the same advantage of the decree as an heir or executor, without entering again into the merits of the cause; and the decree ought to be neither longer nor shorter than the first decree.

Defendant, as devisee against whom a decree had been made, exhibited an original bill in the nature of a bill of revivor. *Per Cur.* defendant is not at liberty to enter into the merits of the cause, and question the justice of the decree;

decree; for had it been a bill of revivor by the heir, he could not have been heard; a devisee shall not be in a better condition than an heir. *Heres natus* is rather to be favoured than *heres factus*.

3 Ver. 672.

Bill of partition brought by several persons; one dies who devises his part to a co-plaintiff, and makes him executor; he brings a bill of revivor, to which it was demurred; and said, that bills of revivor, and bills in nature of revivor, are very different: a bill of revivor can only be by the heir as to the realty, and by an executor and administrator as to the personalty: on bill of revivor the estate continues the same as before abatement; but here in case of a devisee who is a purchaser, the estate is altered, and a purchaser can never revive: demurrer allowed, but leave given to amend the bill and revive as executor; and an original bill in nature of a bill of revivor as devisee, was thought the most proper method.

Select Cases
in Chan. 53.
1 Eq. Caf.
Abr. 2. in
margin, 2
Freeman,
132.

C H A P. IX.

Of Original Bills in the nature of Supplemental Bills.

THIS species of bill becomes necessary where a suit cannot be continued by a bill of revivor, and its defects are not remediable by a supplemental bill; and this happens when the interest of a plaintiff or defendant deceased in a suit then pending becomes wholly extinct, and the same devolves upon and vests in another by a title not derivable from or through him; so that no privity exists be-
tween

tween the person last and him in the present possession of the interest in question.

Treatise upon Pleadings by English Bill. 2 Eq. Cas. Abr. 3. 2 Brown's Parl. Cas. 320. 454. 455.

As in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming intitled upon the death of a prior tenant under the same settlement; for the successor in the first case, and the remainder-man in the second, have the same property, which the predecessor or prior tenant enjoyed; yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights.

Prec. in Ch. 212. 1 Ver. 413. and 4 Brown P. C. 158. as to reading in one cause depositions taken in another.

The successor or the remainder-man may either of them upon the right or interest of the matter in dispute vesting in them, deem it prudent or necessary to extend their claims to the same, or vary the shape and nature of the defence; and this they are enabled to do by the suggestion of new supplemental matter, and the introduction of additional pleadings and depositions; for those taken or used by the predecessor or tenant cannot be used in the same manner as if filed in the same cause, as where depositions are taken in a cause wherein tenant in tail is party, the same cannot be read against the issue in tail; so the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar one.

Treatise upon Pleadings by English Bill 68.

A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become intitled. It must then shew the ground upon which the court ought to grant the benefit of the former
suit

Court of Chancery.

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suit to or against the person so become intit-
tled; and pray the decree of the court, adapted
to the case of the plaintiff in the new bill.

Treatise up-
on Pleadings
by English
Bill 90.
Vid. also
2 Brown
Parl. Case
3. 20.

C H A P. X.

Of Informations.

WHEN the crown, or those whose inte-
rests are the objects of its peculiar care,
deem it expedient to apply to a court of equi-
ty for the purpose of having either of their
respective rights protected, or more clearly as-
certained; such application is made by way of
information, and not by bill; and is carried on
by the King's attorney or solicitor general.

If the suit does not immediately concern the
rights of the crown, as when the object of it
is to have the establishment of a charity secur-
ed, the suit is conducted at the instance and
under the immediate direction of some person
whose name is inserted in the information, and
is termed the relator; and the officers of the
crown in such or the like cases are no further
concerned than as they are instructed and ad-
vised by those whose rights the crown is called
upon to protect or establish.

But if the suit immediately concerns the
rights of the crown, the information is gene-
rally exhibited without a relator; and where a
relator has been named, it has been done
through the tenderness of the officers of the
crown towards the defendant, that the court
might award costs against the relator, if the
suit should appear to have been improperly
instituted,

instituted, or in any stage of it improperly conducted.

Testise up-

on Pleadings by English Bill. The propriety of naming a relator for this purpose, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot in a cause in the Exchequer, *Attorney General v. Fox*. In that cause no relator was named; and though the defendants finally prevailed, they were put to an expence almost equal in value to the property in dispute. *Ibid.* in notes. Vide also 1 Vern. 277. 370. *Attorney General v. Crofts*. 1 Brown Parl. Caf. 222.

By the death of one relator, in cases where there are more than one, the continuation of the suit is not in any degree impeded; and it is the death or determination of interest of the defendant which can only abate the proceedings upon an information; except that in cases where there is but one relator, and that relator should die before the completion of the suit, the court will not permit any farther proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly.

1 Atk. 355.
Attorney
General v.
Jeane.

In an information by the attorney general for the regulation of a charity, it is the business of the court to give proper directions as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information; and this case herein differs from all others wherein the decree must be founded on the prayer in the plaintiff's bill.

It is not absolutely necessary that relators in an information for a charity should be the persons principally interested, for the court will take care at the hearing to decree in such a manner as will best answer the purposes of the charity; and therefore any persons, though the most remote in the contemplation of the charity, may be relators.

2 Atk. 328.

Note,

Note, By statute 43 *Eliz. c. 4.* authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the duchy of *Lancaster*, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the several courts of the several chancellors, upon exceptions taken thereto.

Information against defendant, a justice of the peace, at the relation of the churchwardens of the parish of *St. James's, Westminster*, for an account of several sums of money which he had received in his capacity of magistrate, being money recovered, under several penal statutes, from persons who had been brought before him as having incurred divers penalties; a proportion of which, so received by the defendant, the relators claimed on behalf of the poor of the said parish, who were intitled thereto by virtue of the several statutes creating the penalties. The defendant demurred, upon the ground, that this court was not the proper jurisdiction for this information; but the Lord Chancellor was clearly of a different opinion, and the demurrer was over-ruled.

Attorney
General v.
Reid,
Cor. Lord
Thurlow,
1787.

In an information to apply money given to a charity, to other uses than those specified by the will; where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinherited, must be parties.

Attorney
General v.
Green,
Hil. 1789.
Brown's Ch.
Rep. 495.

Trustees of a charity are ordered to be elected out of a certain parish; an information to remove them as not having been so elected, must state that there were inhabitants fit to be elected. In support of the information, a case was cited of the Attorney General v. *France*,

Before Mr. Baron Eyre, sitting for the Chancellor, where there was a similar devise ; and said, that Mr. B. Eyre thought the circumstance of inhabitancy so material, that he removed the trustees on that ground only.

Attorney
General v.
Cowper,
Brown's
Chan. Rep.

Lord Chancellor said, He conceived there must have been some special ground which did not now appear : but in this case there should have been evidence to shew that there were proper persons in the parish to be trustees, and the trustees neglected to elect them ; and upon this ground information was dismissed, with forty shillings costs.

The different kinds of bills in use in courts of equity, with the peculiar properties for which each is respectively distinguished, having been generally considered, they will be further touched upon in the further progress of this work, in such instances as the subject matter under investigation may render an allusion to them necessary or material.

C H A P. I.

Of the Writ of Subpœna.

THE bill being drawn, ingrossed, and filed with the fix clerk, the clerk in court or solicitor makes out a præcipe thus :

Subpœna, C D, Gent. to appear in Chancery, returnable at the suit of A B, Esq.

This being entered in his *subpœna* book, is to be carried to and left at the *subpœna* office, with five shillings, if but one or two defendants names ; but, if three defendants names, he pays five shillings and sixpence (being sixpence more for the additional label) ; upon which the *subpœna*

subpœna is made out and sealed, after which it is left at the clerk in court's seat by the bag-bearer of the office ; or, if bespoke by the solicitor, it remains in the office for him to send for or fetch it.

A *subpœna* then is a mandatory writ or process directed to, and requiring one or more to appear at a time to come and answer the matters charged against him or them, and is the first and leading process in this court in suits by English Bill. Pract. Reg. 339.

The *subpœna* was anciently and originally a process in the courts of common law, in order to bring in a witness to attest the truth, and it is a summons to the party, under a penalty, to appear and give his testimony. This process was therefore taken up by the High Court of Chancery, where a man was convened to answer upon oath, as to the truth of the plaintiff's allegations, because it was the nearest process that was used in case of attestation by the common law. And this was formed after the manner of citations by the civil and canon law, in which it was necessary to insert the names of the defendants, and also of the plaintiffs at whose suit, and at what time and place, they were to appear. For. Rom. 37.

The form of a *subpœna* to appear and answer is thus :

“ George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c. To A B, C D, and E F, greeting. For certain causes offered before us in Chancery, we command and strictly injoin you, that, laying all other matters aside, and notwithstanding any other excuse, you personally appear before us in our said Chancery,
O 2 the

The Practice of the

the day of instant (or next ensuing), wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you, and to do farther, and receive what our said court shall have considered in this behalf; and this you may in no wise omit, under the penalty of 100*l.*; and have here this writ. Witness ourselves, at *Westminster*, the day of in the year of our reign."

Note, The indorsement on the writ is thus: "By the court, to answer at the suit of G K."

The return of the *subpæna* is either ordinary or extraordinary. First, ordinary; which is at any day certain within the term, for ordinarily no *subpæna* is returnable in the vacation; the reason of which is the same as that on which depends the constitution of the terms, which is very well deduced by *Spelman* in his Law Terms.

Secondly, The extraordinary return is made immediate, and in the time of the vacation; and this is obtained upon petition or motion founded upon an affidavit, that the party lives in town or within ten miles of it; and it is said, the affidavit must name the place where he lives.

PraG. Reg.
341.

But the plaintiff may sue a *subpæna* returnable immediately against an officer of the court, without the usual affidavit, because he is presumed always to attend.

Mosely 42.

Mr. Solicitor General moved for a *subpæna* returnable immediately against Mr. *Huggins* (who was committed to Newgate for murder, of which he was indicted, and a special verdict found, but not yet argued), and that service of it on the turnkey or keeper of Newgate might be

be deemed good service, because his servant had denied them access to him.

Lord Chancellor *King* :

No process can be served on a prisoner committed at the suit of the Crown, without leave: though, if he once appears, you may go on against him; but as I am one of the commissioners of oyer and terminer, before whom he was tried, I will make an order that the keeper of Newgate shall admit you in to serve the process on Mr. *Huggins*.

Mosely 237.
pl. 128.
Anon.

But a *subpæna* returnable immediately is seldom made out but in vacation time; for in term time you may have it returned at any day certain as soon as you please; the immediate one therefore supposes an urgent necessity for an appearance, which cannot be in term time, where the time of appearance is every day.

Care is to be taken that there be no mistake in the body of the *subpæna*; for if there is any, and any of the defendants discover it, he may take advantage of such mistake, and refuse to appear to the plaintiff's bill; and if prosecuted for want of appearance, he may refer the service of the *subpæna* for irregularity, and obtain costs; and the officer of the *subpæna* office, who made out the *subpæna*, is in strictness liable to pay these costs.

And therefore it may not be improper to observe what mistakes vitiate the writ.

First, In the name of the party; if the party served be not named in the writ, there was no authority in the court to convene him, and therefore it could be no contempt in the party not to appear; and if an attachment issues upon such *subpæna*, upon application to the court it will be discharged.

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Secondly,

The Practice of the

Secondly, In the return; as if the *subpœna* be taken out in term time returnable at no certain day, for the party is at a loss when to appear, and therefore there can be no contempt in not obeying.

Thirdly, In the form of the writ; for if the form of the writ be mistaken, it cannot be presumed even in the court to which it is returnable, that it issued from thence, and therefore the subject shall not be obliged to take notice of it.

To each of these *subpœnas*, containing more names than two, there are two labels or small slips of parchment, containing the names of all the defendants, and the plaintiff's name; and there can be no more than three defendants put into one *subpœna*; but husband and wife being accounted in law but as one person, so their names are also accounted but as one for this purpose.

Where there are many plaintiffs they need not all be named, but only A B, and others; since that is sufficient notice to the defendant to appear, for appearance to A B, will be appearance to the rest.

Note, The label is a short copy of the import of the *subpœna*, as it relates to each particular defendant; therefore if the label and body do not agree, the party served may take advantage of it; for it is no contempt in the party not to appear, if he be not served with the *subpœna* itself, or a true true copy of it; and the label is not a true copy of the *subpœna* if it doth not agree with the writ itself.

When an application is made to the court by motion, praying an order for a *subpœna* returnable immediately, a proper affidavit must
be

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be made by the plaintiff in the cause for that purpose; and if the plaintiff lives in *London*, the affidavit is thus:

“ Between A B, Plaintiff,
and
C D, Defendant.

“ A B, the plaintiff in this cause, maketh oath, that the defendant C D lives in *Friday-street* (or other place) in the city of *London*.

“ Sworn,” &c.

But if the defendant lives within ten miles of *London*, then the affidavit is thus:

“ A B, &c. maketh oath, that the defendant C D lives at —, which place is about — miles distant from *London*.

“ A B. Sworn,” &c.

This affidavit is usually sworn before the Master at the public office in *Symond's Inn*; and having given instructions to counsel, with the affidavit to move for a *subpœna* returnable immediately, after the motion is granted, the affidavit must be filed at the affidavit office in *Staples Inn*; and having got a certificate thereof, the counsel's brief and the certificate must be brought to the register office, and the order bespoken, with which 4*s.* 6*d.* is to be left; the next step is to pass the order at the same office, and a copy of it being made and carried with the order itself to one of the acting clerks in the same office, he will mark it entered, for which 1*s.* 6*d.* is to be paid; and the order and *præcipe* being carried and left at the *subpœna* office, the clerk will make out the writ.

The Practice of the

If the plaintiff proceeds by petition, which is most usual, an affidavit must be made as before, and a petition ingrossed (*vid.* title *Petition*) on treble sixpenny stamped paper, with the affidavit annexed, and left at the Secretary's lodge in the *Rolls Yard*; 5*s.* 6*d.* is to be paid when it is taken away; the affidavit must be filed, and the certificate thereof, and petition annexed, being left at the register office, the order will be drawn up, which must be passed and entered as before, and left at the *subpœna* office together with the *præcipe*.

By the 15 *Hen.* 6. c. 4. a *subpœna* is not to be granted till surety be found to satisfy the defendant his damages and expences, if the matter contained in the bill cannot be made good; but this restriction hath by degrees grown out of use, and now entirely vanished; though at this day a plaintiff is compelled to give security to answer costs upon an affidavit that he either lives out of the jurisdiction of the court, or is going beyond sea, &c.

C H A P. II.

Letter Missive.

ABOUT the 16th of *Elizabeth* was introduced the practice of writing letters to the peers before a *subpœna* was issued against them, upon a presumption that a peer would pay obedience to the mere letter of the Chancellor; or else it was founded upon a respect that was thought due to the peerage engaged in public affairs, that they should have notice before the process issued. Especially because having a
numerous

numerous attendance, it might be inconvenient that they should incur a contempt from a process served in the common method by leaving it at their houses with one of their servants.

Gilb. Chan. 66.

When a bill then is exhibited against peers of the realm, the first application is to the Lord Chancellor by petition, praying a letter missive may be directed by him to the defendant to acquaint him that a bill is filed against him at the suit of such person or persons, and to desire him to order an appearance to be entered at a day therein mentioned; and this letter, with a copy of the petition as answered, together with an office-copy of the bill signed by the Six Clerk or his deputy, must be served upon the party personally, or by leaving them at his place of residence.

Vid. title Petitions.

Pract. Reg. 341. Gilb. Ch. 66, 67. 2 Vent. 342. Danv. Abr. 776. 4 Bac. Abrid. 238. 3 Seld. 1543.

This letter is only a compliment. It is not process to found proceedings upon, and the peer may appear or not as he pleases; if upon such service he appears, it is well; but if he makes default, a *subpœna* upon motion is to be awarded against him, because no subsequent process can be formed, but upon a contempt to the great seal, which is the royal authority, and the contempt will not merely arise from the Chancellor's letter, which is *ex gratia*.

Gilb. Chan. 67.

If therefore upon the service of the *subpœna* a peer fails to appear, an affidavit must be made of the service of the letter missive, petition, copy of the bill, and *subpœna*; an attachment must be actually sealed and entered against him (though never executed*) to ground a sequestration upon, which is then moved for against the defendant's real and personal estate (which the court grants of course), unless the defendant being personally served with the order,

* The attachment against peers was condemned in the 14th Eliz. in parliament; and resolved that no attachment lay against the person of a peer, because his person cannot be imprisoned.

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der, shall within eight days after such service shew unto the court good cause to the contrary, and afterwards the defendant must be served personally with this order; and if he then persist in refusing to appear, an affidavit of service of the order must be made, and upon motion the order will be made absolute; for the order for the sequestration is never made absolute without an affidavit of the service of the order to shew cause, and a certificate of no cause being shewn; and this sequestration the court will not discharge till the party has appeared and paid the costs of the process; and then he may move to discharge the sequestration upon notice to the adverse party if it be executed, which will be granted of course.

Gilb. Chan.
66.

If a bill is exhibited against a member of the lower house of parliament, the same proceedings are had against him as against a peer, and the plaintiff proceeds by way of sequestration, this difference excepted, that instead of a letter missive being directed to him, a *subpoena* is sued out in the first instance, but in default of his appearance, no attachment can be executed against him.

Note; no
member

of either House of Parliament can be arrested and taken into custody, nor served with any process of the courts of law; nor can his goods be distrained or seized, without a breach of the privilege of parliament. These privileges however endure no longer than the session of parliament, save only as to the freedom of his person, which in a peer is for ever sacred and inviolable; and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting, which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time: as to all other privileges they cease by the statute 12 Will. 3. c. 3. and 11 Geo. 2. c. 24. immediately after the dissolution or prorogation of parliament, or adjournment of the Houses for above a fortnight; and during these recesses a peer or member of the House of Commons may be sued like an ordinary subject, and in consequence of such suits may be dispossessed of his lands and goods. Vid. also 2 & 3 Anne, c. 18. 4 Geo. 3. c. 33. 1 Blackst. Com. 165.

A sequestration was granted, unless cause, against the defendant Lord Clifford for want of an answer; afterwards he put in an answer, which

which being reported insufficient, it was now moved for a sequestration absolutely, an insufficient answer being no answer.

Master of the Rolls :—As in case of a peer or member of the House of Commons, it is an hardship upon them that a sequestration, which in some respects is in nature of an execution, is the first process : so when a sequestration *nisi* is granted against a peer, for want of an answer, it is good cause against such order *nisi* to shew that the answer is put in, which must be allowed for cause ; and when that is reported insufficient, the plaintiff must move again *de novo* for a sequestration *nisi* ; which *Goldborough*, the Register, said, was the course of the court.

Note, The rule is the same in the case of a member of the House of Commons.

All orders *nisi* require personal service, unless an order be obtained to the contrary ; so personal service of the order *nisi* (in cases where a peer or a member of the House of Commons keeps within his own house to avoid service of the order, and the party serving the process finds it impracticable to serve the order personally) may be dispensed with by an application to the court to substitute a service in lieu of personal service, by leaving the order at the place of residence of such privileged defendant : but it is necessary that such application should be grounded upon a proper affidavit, stating the circumstances of difficulty which attend the personal service of the order, and satisfying the court that the same is impracticable or impossible ; upon which the court will exercise a discretion, and make the order, if the facts stated in the affidavit are strong enough to warrant such a proceeding.

To

2 P. Will.
117. Lord
Clifford's
case: but
vid. Butler
v. Raffie d.
3 Atk. 740.
in which
Lord Hard-
wick doubt-
ed the pro-
priety of
this rule,
although he
pursued it in
that in-
stance. Vid.
also 1 P.
Will. 535.
2 Eq. Cas.
Abr. 711.
pl. 5.

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To obtain a letter missive, a petition, ingrossed upon treble sixpenny stamped paper, must be left with the Lord Chancellor's secretary; and if the prayer of the petition be granted, a letter missive must be bespoken of the secretary; the fees for answering the petition, and procuring the letter missive, amount to 1*l.* 6*s.* 7*d.*

The original letter, with a copy of the petition as answered, and an office copy of the bill as before directed, must be served personally, or left at the defendant's place of residence.

The form of a petition to the Lord Chancellor for his Lordship's letter to a nobleman, is as follows:

“ Between A. B. Plaintiff,
and
W. Earl of A. Defendant.

“ To the Right Honourable the Lord High
Chancellor of Great Britain,

“ The humble Petition of the Plaintiff,

“ Sheweth,

“ That your petitioner hath exhibited his bill in this honourable court against the said W. Earl of A.

“ Your petitioner therefore most humbly prays your Lordship's letter missive directed to the said Earl of A. desiring his Lordship to appear to and answer your petitioner's said bill on the — day of — next.

“ And your petitioner shall ever pray,” &c.

The

The form of the letter is as follows :

“ My Lord, 20th January 1790.

“ It appears by a petition (a copy whereof is herewith sent you) that A. B. Esq; has exhibited his bill in the High Court of Chancery against your Lordship, and desires your appearance thereunto on the — day of — next : wherefore I do at his request (according to the manner used to persons of your quality) desire your Lordship to take knowledge thereof, and to give orders to those you employ in such matters for your appearance to the said bill accordingly. I am,

Your Lordship's humble servant,
THURLOW, C.

“ To the Rt. Honourable
W. Earl of A.”

By an order of the 28th of November 1743, such persons being members of the House of Commons, are not obliged to pay for, or take out any other copy of such bill upon their appearing thereto.

Note, A copy of the bill, signed by the Six Clerk, being left with the letter missive.

Note, The first process of contempt against a *menial servant* of a peer of the realm is a sequestration *nisi*.

1 P. Will. 535. Anon. 12 W. 3. c. 3.

C H A P. III.

Of the Service of the Writ of Subpæna.

THE service of the *subpæna*, if it contains but one defendant, is by delivering the writ either to the party himself, and this is a personal

personal service, or by leaving it at his dwelling house with one of his family; or if he hath no house, at the last place of his usual residence; for if such notice should not be sufficient, it would be an easy matter to escape the extraordinary jurisdiction of this court.

If there be three defendants, you have two labels, one of which must be served on each defendant; and the body of the *subpœna* is to be shewed to the party at the time of the service, and the body under seal left with the defendant who is last served; for if the body of the writ should be left with the first defendant, and the two labels afterwards with the other two defendants, this is by no means good service; because the affidavit of service (if required) must be, that the party who was served with the label was shewed the body under seal at the time of the service; for unless the body, under seal of the court, which is the ensign of authority, appears and is produced to the party served, no man need pay obedience to the mere written label: but if the label only be left with a servant of the family, after appearance the court will not set it aside, the irregularity being waved.

Gillb. Chan.
41.
1 Ves. 386.
Travers v.
Buckley.

It is held good service to leave the *subpœna* hanging on the door, or put in under the door, or by the window, of the house where the defendant ordinarily dwells or resides. But this is, where it is presumed the *subpœna* comes to his hands afterwards, or he has notice of it, or that he might probably be in the house at the time, and neither he nor any of the family would be seen.

Praet. Reg.
342.

So where A, that served the *subpœna*, deposed, that he hung the same upon B's door,
and

and within an hour after saw him stand with a writ in his hand, which he supposed to be the same *subpœna*; attachment awarded, and B committed to the Fleet for non-appearance.

Cary's Rep.
57. Rickers
and Stil-
man.

So also hearing the defendant say that he was served with a *subpœna*, is good evidence, it is said, to prove service; so is an affidavit, that he saw such a person served with the *subpœna*.

2 Toth. 6.
Pract. Reg.
342.

Where one party has sued another at law, and such plaintiff cannot be found or heard of, or if beyond sea, the court on motion or petition, grounded on an affidavit of the fact, will order service of *subpœna* on another of the parties, or on the clerk in court, the solicitor, or the attorney, to be good service on the defendant, and the order and *subpœna* being served on the defendant's clerk in court, solicitor, or attorney, and he or they refusing to appear, upon an affidavit thereof, the clerk in court will make out an attachment, upon which an injunction may be moved for to stay proceedings at law.

Pract. Reg.
342.

The court, on motion, will order leaving a *subpœna* with the turnkey of a prison to be good service on a prisoner at large: if the defendant is in close custody, such service is good without motion.

Ibid. Vid.
Huggins's
case before
mentioned,
p. 196.

If the *subpœna* be against husband and wife, service on the husband is good service on him and his wife; and service on the wife is good service on the husband, if the body be left with her under seal at the husband's place of abode; because it is presumed to be sufficient notice to the other; but leaving a label with the wife has been doubted, if good service on the husband: And, if the husband appears, yet, for want of an appearance for the wife, an attachment

Gillb. Chan.
42. Cary
76-111.

Gilb. Chan.
42. Cary
76-111.

ment will issue against both, inasmuch as it is a contempt in both, if the wife does not appear as well as the husband, and the husband ought to take care to order an appearance for his wife.

Love and
Baker,
Chan. Caf.
Nelf. Chan.
Rep. 103.

Qu. if the
defendant
was in an
enemy's
country
where no
commission
could go to
take his an-
swer. 1 P.
Will. 523.
Anon.

Ibid.

If two persons commence a suit beyond sea, to arrest the plaintiff's goods at *Leghorn*, by order of court, the service on one defendant here may be service on the other beyond sea; for both joining in the suit beyond sea are looked on in the cause but as one person, they being in this matter the same in interest.

A, being beyond sea, sues B at law; B brings a bill in equity against A; the order that service on the defendant's attorney at law shall be good service; but *not* that such attorney shall put in an answer without oath.

Note, If there had been a general letter of attorney to one to appear in and *defend* suits, the court would have ordered the attorney to appear for the principal, and that service on him should have been good service.

So where defendant residing at *St. Vincent's* in *America*, mortgaged lands in *England* to the plaintiff; upon the back of the mortgage-deed a memorandum of an agreement was indorsed, empowering and authorising ——— *Turton* and ——— *Somerton*, two attorneys, to receive a *subpœna* for him, and to enter an appearance in Chancery, that a sale or foreclosure of the estate might be decreed, if the money was not paid at the day. *Turton* and *Somerton* were not parties to the deed. Plaintiff filed his bill to foreclose, and applied to *Turton* and *Somerton* to accept the *subpœna* and appear, which they refused to do: and now it was moved by Mr. *Ambler*, "That service
" of

“ of *subpœna* upon them might be good service.”

Lord *Thurlow*: This is going beyond what the court hath hitherto done in ordinary cases; the court hath ordered service upon the attorney to be good service to ground injunction against proceedings at law, where the plaintiff below is out of the jurisdiction. There have been cases where a party has empowered an attorney to accept the process, and the bill was against the attorney and principal; and the attorney, by his answer, admitted he had accepted the process pursuant to the authority delegated to him from the principal, and then he bound himself. In the present case there has been no such undertaking on the part of the attornies, and you want to make service on them good service, not having undertaken, but on the contrary, peremptorily refused to act under the agreement. There is a difference between a man agreeing his attorney shall accept a *subpœna*, and the court taking up the thing and saying, he shall accept the writ and appear. The attornies here are not bound to give him any notice, and he can have no remedy against them. Upon good consideration of the case, I do not think I can extend the jurisdiction so far, though the Master of the Rolls thinks otherwise. Take nothing by the motion.

Willings
v *Loman*,
Hil. 1781.
Hind's Prac.
in Ch. 91.

The *subpœna* must be served on or before the return day; and service on the return day is good before twelve o'clock at night; and service is good in the night, or on *Sunday*, if the *subpœna* is not returnable on that day; for this being only process of notice, and not to arrest the party, it can create no disturbance though it be served in the night or on *Sunday*.

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Gillb. Chan.
42.

So a *subpœna* may be made returnable and served the same day on which it is sealed; but it must be served before the court rises, otherwise it is not good service, and the defendant is not bound to appear thereto.

Toth. 33.

Where oath is made of a misdemeanor in beating or abusing a person serving any process of this court, the party offending is to stand committed upon motion; and no examination in that case is to be admitted.

Ord. Chan.
141.

So it is, when affidavit is made by two persons, of scandalous or contemptuous words being spoken against the court, or the process thereof; and a single affidavit in this case will be sufficient for an attachment, upon which the person charged with such contempt shall be brought in to be examined; and, if the contempt be confessed or proved, he is to be committed till he make the court satisfaction, and pay the prosecutor his costs.

3 Atk. 219.

But, though contemptuous words were spoken of a *subpœna*, and the person serving it severely beaten, yet as these facts were proved by the oath of a single person only, the court would not, in the first instance, order him to stand committed, but made a rule upon him to show cause why he should not stand committed. And the Register, on being asked, said, He took it to be the rule of the court, that on a motion for a commitment, the oath of two persons was necessary to prove contemptuous words, upon serving the process of the court; but the oath of one was sufficient to prove a battery on the person by whom it was served. Lord *Hardwicke* doubted of this difference.

The plaintiff showed the defendant a writ, but did not deliver him a note of the day of his

his appearance here; nor did the same appear by the label, or any other writing; and the defendant appearing, found no bill. The court ordered the defendant his costs against the plaintiff for such serving.

Cary's Rep.
83.

At the hearing of this cause, it was objected by the defendant, that J. S. who was a necessary defendant, was not brought to hearing. The plaintiff shewed they had prosecuted him to a sequestration, and therefore might go on. The defendant answered, that the affidavit on which the process of sequestration was founded, was insufficient; and upon reading of it, it appeared that the *subpæna* was left at a place where J. S. had only lodged once, and that about two years before the service.

The court held it not sufficient service to go on against the other defendant alone, unless the plaintiff would consent to stand in the place of J. S. to all purposes, which he not doing, the cause went off for want of parties.

Prec. in Ch.
100. 2 Ver.
369. Gilb.
Chanc. 41.

Defendant lived at *Epsom*, about ten miles from *London*; and being a barrister, he had chambers in the *Temple*, but had little or no business. A *subpæna* returnable immediately was moved for, upon an affidavit, stating that defendant's place of abode was at *Epsom*, but that he had chambers in the *Temple*, and resided there.

Lord *Thurlow*: As it does not appear his place of abode is in the *Temple*, I cannot make any order. Take nothing by the motion.

V. Shaw,
Hil. 1781.
Hind's Prac.
in Chan. 92.

If the defendant be a member of the House of Commons, an office-copy of the bill, signed by the Six Clerk or his deputy, must accompany the writ, and may be served personally; or, which is more convenient and most usual,

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by leaving the *subpœna* under seal, and copy of the bill, at the defendant's dwelling house or place of residence, with one of the family.

If a bill be filed against a corporation, the process must be served upon some one of the members.

By the 5th of *Geo. 2. c. 25.* it is enacted, That, where persons have withdrawn themselves beyond the seas, or otherwise absconded to avoid being served with process to appear; if in any suit instituted in any court of equity, any defendant against whom any *subpœna* or other process shall issue, shall not cause his appearance to be entered upon such process within such time, and in such manner as, according to the rules of the court, the same ought to have been entered, in case such process had been duly served, and an affidavit shall be made to the satisfaction of such court, that such defendant is beyond seas, or that, upon inquiry at his usual place of abode, he could not be found, so as to be served with such process, and there is just ground to believe such defendant is gone out of the realm, or otherwise absconds to avoid being served, the court out of which such process issued may make an order, directing and appointing such defendant to appear at a certain day therein to be named; and a copy of such order shall, within fourteen days after such order made, be inserted in the *London Gazette*, and published on some *Lord's day* immediately after divine service, in the parish church of the parish where such defendant made his usual abode, within thirty days next before such his absenting; and also a copy of such order shall within the time aforesaid be posted up in some public place at the *Royal Exchange* in *London*; and

and, if the defendant doth not appear within the time limited by such order, and within such further time as the court shall appoint, then, on proof made of the publication of such order, as aforesaid, the court, being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as shall be thought just; and may thereupon issue process to compel the performance of such decree, either by an immediate sequestration of the real and personal estate and effects of the party so absconding, or such part thereof as may be sufficient to satisfy the demands of the plaintiff or plaintiffs, or by causing possession of the estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise, as the case may require; and may order such plaintiff to be paid his demand out of the estate and effects so sequestered according to the decree, such plaintiff first giving sufficient security, in such sum as the court shall think proper, to abide such order, touching the restitution of such estate or effects, as the court shall think proper to make concerning the same, upon the defendant's appearance to defend such suit, and paying such costs to the plaintiff as the court shall order; and, plaintiff refusing or neglecting to give such security, the estate and effects so sequestered, or whereof possession shall be decreed to be delivered, to remain under the direction of the court until appearance of the defendant, and payment of costs to the plaintiff.

Provided, that if any decree shall be made in pursuance of this act against any person being out of the realm, or absconding as aforesaid at the time such decree is pronounced, and such

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person shall, within seven years after the making such decree, return, or be publicly visible, then he shall be served with a copy of such decree within a reasonable time after his return or public appearance; and in case of defendant's death within seven years after making such decree, before his return or appearing openly, his heir or executor to be served with such copy.

Provided, that if any person so served with a copy of the decree shall not within six months appear and petition to have the cause reheard, such decree shall be absolutely confirmed against such person, and all persons claiming under him.

Provided, that if any person so served with a copy of such decree shall within six months after service, or not being served, shall within seven years after making such decree, appear in court and petition to be heard as to the matter of such decree, and shall give security for costs, the person petitioning shall be admitted to answer the bill; and issue may be joined as if the party had originally appeared, and as if no proceedings had been had.

Provided also, that if any person against whom such decree shall be made, his heirs, executors, or administrators, shall not within seven years after making such decree, appear and petition to have the cause reheard, and give security for costs, such decree shall stand absolutely confirmed: and at the end of such seven years, the court may make such further order as shall be just, and according to the circumstances of the case.

Note, This act not to extend to make good any proceedings against any person beyond the seas,

feas, unless it shall appear to the satisfaction of the court, by affidavit before the making of such decree, that such person had been in *England* within two years next before the *subpana* in such suit issued against such person.

This act therefore empowers the plaintiff to go on as well upon a sequestration for *not appearing*, as upon a sequestration for *not complying with a decree*, which could not be done but by the authority of this act; for, before the passing of this act, if the defendant had not appeared, the court would not decree the bill to be taken *pro confesso*, but would order a sequestration against his real and personal estate, until he cleared his contempt; for no decree could be had against him till he had appeared.

2 Ch. Rep.
283.
2 Freeman
Rep. 127.

But it is not sufficient upon this statute to make an affidavit, that the party making it was *informed*, and *believes*, that the defendant withdrew himself into *Ireland* in order to avoid being served with the process of this court, but it must likewise be sworn by *whom* the defendant received such *information*.

2 Barnard.
Rep. 403.
—404.
17 Vin. Abr.
543, 544. in
notes.

Note, Lord *Hardwick* was of opinion, that as the act of 5th Geo. 2. c. 25. is silent, nor mentions any penalty for his disobeying it, the minister of a parish, who prevents an order for defendant's appearance being published pursuant to the above-mentioned statute, is indictable for a contempt of the order of this court.

Burton v.
Maltons.
2 Atk. 114.

Defendant, a member of the House of Commons, having a house at *Southampton*, and no town residence, was served at a friend's house, with whom he was upon a visit, with a *subpana* returnable immediately. For default of appearance, a sequestration had been awarded; and

a motion was made at the instance of defendant to set the process aside for irregularity; and therefore for that purpose, defendant having *no place of residence in town*, otherwise than as above stated, was relied on, and *Bearcroft's Case in Scac.* was cited. Lord *Thurlow* could not suppose defendant, a member of parliament, during the session of parliament, had no town residence, or that the residence above stated should not be taken as a residence *quoad* the defendant, whose duty it was to attend, and actually did attend, the house. That *Bearcroft's* case differed from the present; the bill being for an account, if defendant wanted a longer time than usual to answer, upon application, stating the circumstances, he would be allowed it; and refused to grant the motion.

A bill is brought against one partner for a joint demand, and the other is not amenable to the court, being out of the kingdom; the question was, Whether the partner before the court shall pay the whole, or one moiety of the debt?

Lord Chancellor: Upon considering this case, I am of opinion, that the partner before the court ought to pay the whole.

This is analogous to the proceedings in courts of law, and likewise in this court; for where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the same thing, as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration.

At law, if there are two joint debtors, the creditor must bring his action against both; but if one only appears, and the creditor car-

ries it on through the whole line of a process to an outlawry, against the person not appearing, then he may proceed solely against the other, and shall have judgment for his whole debt against the person appearing, and judgment only by default against the person who does not appear, which is all he can do with respect to the latter; for as to his goods, they are forfeited to the crown upon the outlawry.

So, before the act of 5th Geo. 2. c. 25. you might carry it on through the whole line of process against a defendant who did not appear, to a sequestration, and no farther; you might notwithstanding set down the cause against the other defendant, and have a decree for the whole.

If you could do this before the act of parliament, when a person was in the kingdom, and obstinately refused to appear, much more ought the court to make a decree against one partner, where the other is out of the kingdom, that an account should be taken, and that the whole which appears to be due to the plaintiff should be paid by the defendant, the partner who is brought to a hearing; and his Lordship ordered it accordingly.

Where infants are parties to a cause, and the mother secretes them, so as they cannot be served, service of the *subpœna* upon the mother is sufficient, as she is the natural guardian of her children.

It is observable, that the statute of 5 Geo. 2. c. 25. seems to have made no provision for the case of a defendant served with a *subpœna*, and neglecting to enter his appearance, and avoiding the process of contempt; and the plaintiff in such a predicament is left to the ordinary method

Darwent v.
Walton,
2 Atk. 511.
Vid. also
Venassen v.
South Sea
Company,
1 Ves. 395.
Davis v.
Davis,
3 Atk.

2 Atk. 70.
Vid. also
Hargrave's
edition of
Co. Litt.
104. b.

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method of issuing process to a sequestration, and holding the lands sequestered; for the defendant must have appeared, or been in custody before a decree *pro confesso* can be made against him.

There are *subpana's* for other purposes in use in this court, which will be taken notice of with greater propriety in subsequent parts of this work.

C H A P. IV.

Appearance to the Subpana.

THE usual method of a defendant's appearing to a bill filed against him is (either by himself or his attorney) to employ or retain a clerk in court, or waiting clerk, to appear for him; and then recourse is to be had to the general bill-book, to see who filed the bill; which being done, the defendant's clerk in court then goes to the plaintiff's clerk in court to appear thereto, and thereupon enters defendant's appearance; after which he goes into the study of the plaintiff's Six Clerk who filed the bill, and there takes it from the file; at the same time leaving a note with the Six Clerk, and entering the same in his book: but, if another clerk in court has appeared for any other defendant before, then the plaintiff's clerk in court is applied to, to know what clerk in court appeared for the other defendant; and then the clerk in court, who appeared before for another defendant, is applied to, of whom the bill is received in order to be copied.

An appearance to the *subpæna* is either voluntary or compulsory: Voluntary, when the defendant comes in upon the return of the *subpæna*, as appears in manner last before mentioned; compulsory, when he is taken and brought in upon an attachment, proclamation, commission of rebellion, or by the serjeant at arms; in either of which cases the defendant must enter his appearance with the register, though, sometimes, upon being arrested upon an attachment or proclamation, the sheriff will take a bail bond of the defendant in 40*l.* penalty, conditioned to perform what the defendant is arrested for, by the return of the writ; and, if the defendant does not answer by the return of the writ, the bail bond may be put in suit and recovered at law.

But, if the defendant is desirous to enter his appearance with the register, he is carried to the register-office; and one of the entering registers writes a certificate, on a double sixpenny stamped sheet, of the defendant's entering his appearance with the register on the writ he is arrested upon, and consenting that a serjeant at arms shall issue against him for his contempt, in case he is not discharged therefrom.

So, if the defendant be arrested in the country at some distance, where he cannot conveniently come to *London*, he may obtain an order, that he may enter his appearance with the register by his clerk in court on such process; and his clerk in court having sufficient authority for that purpose, carries the order to the register-office; and the entering register writes a certificate on the said order of the said defendant's having entered his appearance with the register by his clerk in court in manner as aforesaid;

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said ; and, upon obtaining such certificate, the defendant is discharged from his arrest : but then, in case such process regularly issued against him, he must obtain an order for time to put in his answer, and it is incumbent upon him to put in his answer accordingly, and pay the costs of his being arrested on such process, otherwise the plaintiff may obtain an order for the serjeant at arms to apprehend him for his said contempt.

A defendant is not bound to appear till the return of the process of *subpoena*, though he be served with it ever so long before.

If a defendant, within twenty miles of *London*, be served with a *subpoena* to appear and answer on the return day, he hath four days after the return to appear in ; if he be served within four days before the day of the return, he hath four days exclusive of the day of service ; if served four days or more before the return, he must appear on the return day.

If above twenty miles from *London*, a defendant be served with a *subpoena* on the return day, or within eight days before the return, he hath in either case eight days from the day of service to appear ; but, if he be served eight days or more, he must appear on the return day.

If the *subpoena* is returnable immediately, the defendant hath the same time, exclusive of the day of service, to appear in, as before, (viz.) within twenty miles of *London* four days, above twenty miles eight days.

After a defendant hath been served with a *subpoena*, and given directions to a clerk in court to appear for him, if such clerk in court finds that the bill is not entered, he usually puts up a note in the Six Clerk's office, as follows :

“ Enter

“ Enter bill,
“ A against B.”

But if he has preferred costs, then he writes thus :

“ Enter bill, costs preferred,
A against B.”

Which note the defendant's Six Clerk enters in the costs book ; which being done, the clerk in court makes out a bill of costs, and carries it before one of the Masters in Chancery ; who taxes the bill of costs, and sets his name to the same ; and, if it be a town cause, he usually allows 1 l. 6 s. 8 d. and, if a country cause, 1 l. 13 s. 4 d. ; and the bill of costs is then carried to the register, who enters it, for which 1 s. 4 d. is paid, and then a *subpœna* for the costs is taken out

This *subpœna* for costs (which is always payable to the defendant or bearer) must be served on the plaintiff personally, and the costs demanded of him ; and, if upon such service he refuse to pay the said costs, the defendant may (upon affidavit that the *subpœna* for costs was served and the money demanded) have an attachment directed to the sheriff of the county where the defendant lives, to attach him for the costs ; and the plaintiff will not be permitted to file his bill till he has paid the costs ; but he may move to retain his bill upon payment of costs out of purse.

Defendant having a town residence and a country residence, a *subpœna* returnable immediate was served upon her, by leaving the body under seal, at her house in town, defendant at that time being at her house in the country (*Penshurst in Kent*), above ten miles from *London* ;

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don; defendant appeared *gratis*, as in a town cause, and obtained by petition the usual order in a country cause, (*viz.*) a *commission to take her answer*, and *six weeks time to return it*. Plaintiff moved to discharge this order for irregularity; and contended, that defendant having appeared as in a town cause, she had remedied all defects, and should be obliged to answer as in a town cause.

Sidney titu-
lar Earl of
Leicester v.
Perry, Hil.
1772.
Hind's Pr.
in Chan.
192.

Lord *Thurlow*: It is not conclusive evidence that it is a town cause, if she appears as in a town cause; but rather as if she was desirous of expediting the cause; and here she has appeared *gratis*. Let the order stand as it does.

The executors named in the will of A, a testator, having renounced the execution of the will, administration with the will annexed was granted to the testator's widow and her second husband during the minority of the testator's daughter: A bill was brought against the husband and wife as joint administrators, which administration determined since the filing the bill, upon the daughter's coming of age; process of contempt issued against both; and the wife being taken up on such process, gave a bail bond for her appearance, and appeared for herself only; afterwards she applied for time to answer separately, and obtained an order for that purpose.

It was moved that the bail bond given by her to obtain her liberty on being arrested for want of appearance, and also her appearance, might be discharged; and the motion was made upon two points: First, Whether the taking her up on the attachment was regular? Secondly, If not, whether the irregularity was waved by her appearance? And first, it was insisted upon

upon as irregular; for that the husband and wife being but one person, she cannot appear for herself: upon which principle the cases go; for, where this court compels a woman to appear, and put in a separate answer, it is because the husband is only for conformity joined; the demand being against her in respect of her separate estate, and the husband is not affected in consequence of the decree; though in courts of law a general appearance waives any objection to the writ, because advantage might have been taken of it, as abatement is waived by pleading in chief: but in this court appearance is first necessary, before any complaint of the irregularity of service can be made.

Lord Chancellor: The question now is, whether it is consistent with law, and the course of this court, after she has appeared and prayed time to answer separately, and had an order for it, to discharge her from these acts of her own? and I think not: The court takes all methods, and extends its process to assist parties coming at their relief; and it is more necessary to do this here than in courts of law, where actions are more simple. Indeed there does not appear here any *separate* interest of the wife; but she has appeared, and obtained leave to put in a separate answer absolute and unconditional; the effect of which appearance is said not to be the same as at common law; but this is the first time I ever heard of such a distinction. Appearance salves no error in the original writ, but error in mesne process only. A party may appear voluntarily on a bill in this court; so he may at law upon an original writ without any process. I never before heard of the doctrine, that after appearance the party might

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might complain of the irregularity of the service of *subpœna*; for, if the *label* only be left with a servant of the family, after appearance the court will not set it aside, the irregularity being waived: but this is stronger, being the same as after imparlances at common law; and it is an admission on her part, that there is something separate from the husband to which the wife is to answer. But it is said, the appearance of the wife is absolutely void in point of law, and therefore every thing built on it falls to the ground, because the wife can in no case appear without the husband; which I deny, both in the proceedings in this court and at law; for there are several cases at law where the appearance by the wife without the husband is good.

Vid. Toth.
157. Well-
dean.—

Which shews
that this
court exer-
cises stricter
jurisdiction
over married
women than
courts of
law.

Dyer 210. in the marginal notes (which are well known to be of Chief Justice Treby's writing), shews that the appearance of a feme covert is not in every case void, even at law: So in Sti. 475. *Lee v. Lord Baltimore*; which case was undoubtedly going a great way: But a more modern case is in Salk. 114. *Carpenter v. Taustin*; where, Holt says, common bail should have been filed for the wife; which shews that appearance by a wife at law is not void; for common bail in B. R. is common appearance, which proves the wife may appear, and may be compelled in many cases.

It is true, at law the proceedings cannot be carried on till the husband appears, or something is done to supply it, as by continuances: So *here* it will be another consideration when the cause comes to proceed, what the court can do unless the husband appears; but that does not extend to discharge her appearance and that order made; and when courts of law go so far, it is a further reason why I should not be too strict in the course of proceedings in this court. But the point of this case is on her appearance and the order made.

The Master of the Rolls being present concurred in opinion, that the defendant was precluded

cluded from taking this objection now. If any act shewing an acquiescence and defence of the cause, the court always says, it is too late to set it aside; here is not only an appearance, but an application for time; and that case in *Salk.* is very strong authority in the present case.

Travers v. Boclaby.

1 Atk. 1 Eq. Abr. 65. pl. S. S. C. 3 P. Will. 38. 2 Atk. 50. 2 Eq. Caf. Abr. 270. pl. 28. 2 Vern. 614. Prec. in Chan. 24. 2 Vern. 293. Vid. also *Salk.* 116. *Dearly v. Duchefs of Mazarine.*

An order for appearing *gratis*, implies that defendant shall pray no day over.

These words are taken to

supply the want of service of a *subpoena*, that the defendant should be as much bound to appear as if proved he had been served, and are no more than admitting service. 2 P. Will. 368.

The husband must enter an appearance for his wife by his clerk in court, or an attachment will issue against both.

Cary, 76. 3.

No appearance will give a jurisdiction to a limited court; and if there is want of jurisdiction in the cause, it may be called in question at any time even after sentence.

1 Ves. 471.

When defendant applied to discharge an order made on the statute of 5th *Geo. 2. c. 25.* in order to shew that he did not abscond or retire into *Ireland* for the sake of avoiding the process of the court, the court thought proper that he should make an affidavit in answer to the substance of the charge by the bill.

Barnard, 401.

An order was obtained by *contrivance* upon the statute of 5th *Geo. 2.*; the defendant appeared to the bill, and the court, on application, set aside the order; and the appearance to the bill was set aside likewise; for though an appearance usually saves error in the process; yet in this case the order being obtained by male practice and imposition on the court, and the appearance

1 Ves. 386.

Bernard,
403.

Ibid.

ance having so bad a foundation, cannot establish and make it good.

Note, The solicitor was committed for obtaining this order in an undue manner.

By the statute 5th Geo. 2. c. 25. sec. 2. if any defendant or defendants by virtue of any writ of *habeas corpus*, or other process issuing out of any court of equity, shall be brought into court, and shall neglect or refuse to enter his, her, or their appearance according to the rules or method of such court, or appoint a clerk in court to act on his, her, or their behalf respectively, such court may appoint a clerk in court, or attorney, to enter an appearance for such defendant or defendants respectively; and such proceedings may be had in the cause, as if the party had actually appeared.

And by the third section in the said act, persons in custody so refusing to appear, are to be served with a copy of the decree, before any process can be taken out to compel a performance thereof.

The entering an appearance with the register differs from appearing by the clerk in court; for when a man appears by his clerk in court, he appears as upon a *subpœna*, and therefore appears as not in contempt; so if he departs without answering, that is only a foundation to issue process, because there is no record of his appearance, for the defendant's clerk in court only gives notice to the plaintiff, which he enters in his book, that he appears; but when a defendant enters his appearance with the register, it is an appearance upon the records of the court, and as, upon an attachment; and in that case, if he neglects to put in his answer within the time limited by the course of the court,

court, it is a motion of course, that he shall stand committed to the Fleet, and then he must answer in *vinculis*, for he is a prisoner to the court, and answers as a prisoner.

If an infant, being served with a *subpœna*, will not appear to a bill, on affidavit of service of the *subpœna*, an attachment issues against the infant (though never executed), and counsel moves upon the attachment for an order for a messenger to bring the infant into court: and when he is brought into court, if no one offers on his behalf to be assigned his guardian, the court usually orders the senior *fix* clerk, not *towards the cause*, to be assigned his guardian, to appear to the said bill, and answer and defend the said suit.

Also if an infant appears to a bill, and refuses to answer, an attachment issues against him for not answering; but he cannot be arrested upon the attachment; and therefore a motion is made upon the attachment, for a messenger to bring the infant into court; and the court will make such order as aforesaid: This order must be drawn up, passed and entered at the register office, and given to the messenger of the court, who thereupon procures the following warrant:

“Whereas by an order, bearing date the 15th day of *January* instant, made in a cause between ——— plaintiff, and ——— defendant, *It is ordered*, That the messenger attending this court do take the said defendant — an infant, into custody, and bring him into this court to have a guardian assigned him, by whom he may answer the plaintiff's bill and defend the suit: These are therefore, in pursuance of the said order, to will and require you forth-

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with, upon receipt hereof, to make diligent search and inquiry after the said defendant, ———, an infant; and wheresoever you shall find him, to arrest and apprehend him, and bring him into this court to have a guardian assigned him as aforesaid; willing and requiring all and singular mayors, sheriffs, justices of the peace, bailiffs, constables, headboroughs, and all others his majesty's officers and loving subjects, to be aiding and assisting to you in the due execution of the premises, as they tender his majesty's service, and will answer the contrary at their peril; and this shall be your warrant. Dated this 3d day of *February* in the 31st year of the reign of our sovereign lord *George* the Third, by the Grace of God, of *Great Britain, France, and Ireland*, King, Defender of the Faith, and so forth, and in the year of our Lord 1790.

THURLOW, C."

To ——— Esq. his Majesty's messenger attending the High Court of Chancery, or his deputy.

I do appoint Mr. ——— my deputy to execute this warrant. Witness my hand, this 3d day of *February* 1790.

Upon this warrant the messenger brings the infant into court, and the court being apprized thereof by counsel, assigns the senior six clerk, *not towards the cause*, his guardian, if no friend or relation will undertake the guardianship.

But commonly some relation or friend of the infant prays the court to be appointed guardian for the infant, to answer and defend such suit, which the court orders accordingly; and such

such answer must be always sworn by such guardian.

Note, The infant in town must appear in court and have a guardian assigned him; but if resident in the country, he sues out a commission to assign a guardian.

C H A P. V.

Of Process to enforce Appearance.

IF the defendant doth not appear on being served with process of *subpœna* in order to answer; then upon affidavit of service of the *subpœna*, an attachment may be issued against him; and if a *non est inventus* is returned by the sheriff, an attachment with proclamations, directed to the sheriff, may be issued; and this being also returned *non est inventus*; and if he stands further in contempt, then a *commission of rebellion*, directed to four or more commissioners, may be issued for apprehending, and taking him into custody, who may either detain him in custody, or may bring him into court; and the court will make an order to deliver him to the warden of the Fleet, if taken in *London*; and if taken in the country may deliver him to safe custody in the county goal; in the execution of which commission the persons to whom it is directed may, with the assistance of a constable, justify breaking open doors, if they know the person to be within the house. And if the defendant stands further in contempt, then, (a *non est inventus* returned by the commissioners,) you may move the court upon the commission of rebellion (which must be produced)

duced) for a serjeant at arms : and if he cannot be taken, on the serjeant's certifying the same, you may move upon his certificate for an order for a sequestration directed to certain commissioners, to sequester the defendant's personal estate, and the rents and profits of his real estates, until answer and further order ; by virtue of which order a sequestration is issued.

Such in the detail are the different processes awarded by the authority of this court to enforce and compel an obedience to its rules, orders, or decrees ; but to enable us the better to understand the nature, operation, and effect of each, it will be necessary to consider them separately, and in the order in which the same are awarded ; and first of the writ of attachment.

Pract. Reg.
323.

An attachment is the first process of contempt in this court ; and is a writ directed to the sheriff, commanding him to attach, that is to say, to take a person, so as he may bring him into court at a day certain to answer a contempt : and as this process is always founded upon some contempt of the court, so it is most commonly for not obeying the process or orders of the court.

An attachment (which is derived from the *French*, signifying to take or apprehend by commandment of a writ or precept) differs from an arrest, in that, he that arresteth a man, carrieth him to a higher power to be disposed of ; but he that attacheth, keepeth the party attached, and presents him in court at the day assigned, as appears by the words of the writ, *Præcipimus tibi quod attachias talem et habes eum coram nobis, &c.*

No

No clerk of this court shall issue any attachment for not appearing, but upon affidavit first made positive and certain of the day and place of service of the *subpœna*, and the time of its return, whereby it shall appear that such service was made; if in *London*, or within twenty miles thereof, four days at least, and if above twenty miles, then eight days before such attachment entered, exclusive of the day of service: and the register shall not enter in his office any common rule or attachment issuing from the six clerks office, but by a note under the clerk's own hand that is attorney in the cause, or his agent, or deputy by him appointed, or for whom he will answer; and the clerks in court shall carefully see that all attachments be duly entered with the register, according to the ancient course of the court.

Ord. Chan.
115. 54.
Pract. Reg.
21.

When the *subpœna* is served, and affidavit made of it before a Master in Chancery, if the party does not appear within the time limited by the rules of the court, an attachment issues of course; and for this purpose the solicitor for the plaintiff must apply to the clerk in court, and bespeak the attachment, leaving the affidavit of service at the same time with the clerk in the court, which he will take care to file, before the return of the attachment; and the writ being made out, is left with the bag-bearer of the six clerks office to be sealed. The form of the writ is as follows:

For the form
of the affi-
davit, vid.
title Affid-
avit.

“George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth: To the sheriff of ———, greeting, We command you to attach ——— so as to have him before us in our court of Chancery, wheresoever the said court shall then be, there to answer to us,

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2. this.

as well touching a contempt which he, as it is alledged, hath committed against us, as also such other matters as shall be then laid to his charge; and farther, to abide such order as our said court shall make in his behalf: and hereof fail not, and bring this writ with you. Witness ourselves at *Westminster*, the — day of — in the — year of our reign.”

“To the sheriff of — an attachment against — for not appearing at the suit of — returnable in —.”

To the bottom of this writ, on the right hand side, put the surname of the Master of the Rolls, and the fix clerk in whose division it is made out: And indorse your writ, “*By the court, at the suit of — for want of an appearance, or for want of an answer.*” And about the middle of the back of the writ put the surname of the clerk in court that makes out the writ. The clerk in court then makes an entry in his writ book, and also a note to enter with the register, which corresponds with the entry in his writ book, and is in this form:

“To the sheriff of — an attachment against — defendant for want of his appearance at the suit of — returnable in —.”

Radcliffe clerk.—Dated 26th January 1790.”

To this the sworn clerk’s name who enters it, is subscribed, and the day it is entered, as above; and then it is to be left with one of the entering registers, to whom 1s. 2d. is to be paid therewith.

Attachments for costs are of the like form, only the writ is indorsed, “*By the court for non-payment of costs (naming the sum) at the suit of —.*”

And

And note, you may move the court or petition his honour, the Master of the Rolls, to have it returnable immediately, if the defend-lives within ten miles of *London*; and the same affidavit will do as for a *subpœna* returnable immediately; but for a petition (*vid.* under the title Petition.)

In this writ of attachment, and all other writs, regard is to be had to the jurisdiction and privileges of certain places, as the *Cinque Ports*, and the counties palatine of *Lancaster*, *Chester*, and *Durham*; and the direction of the writs in such cases is of a peculiar form: as, for instance, where an attachment issues against an inhabitant of *Hastings*, *Rye*, *Romney*, &c. it is directed to the lord warden of the *Cinque Ports*.

And if the writ is to be executed within the county palatine of *Lancaster*, then it is directed thus:

"George the Third, &c. To our chancellor of our county palatine of *Lancaster*, or his deputy, greeting. We command you that by our writ under your seal of our aforesaid county duly issued, you command the sheriff of our aforesaid county to attach," &c. (as before.)

And if the attachment be awarded against any dwelling within the county palatine of *Chester*, then it is directed to the chamberlain of *Chester*, in this form:

"George the Third, &c. To the chamberlain of our county palatine of *Chester*, or his deputy, these, greeting. We command you, that by our writ, under the seal of the county palatine aforesaid, duly to be made, you command the same sheriff that he attach," &c.

Attachment

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Attachment to the county palatine of *Durham*, is in this form :

“ *George the Third, &c.* To the right reverend father in God — — by divine providence, lord bishop of *Durham*, or his deputy, these, greeting. We command you, that by our writ, under the seal of the said county palatine aforesaid duly to be made, you command the same sheriff that he attach,” &c.

To the warden of the Fleet, it is thus :

“ *George the Third, &c.* To the warden of our prison of the Fleet, or his deputy, these, greeting. We command you to attach,” &c.

Attachment to the King's Bench is thus :

“ *George the Third, &c.* To the marshal of the Marshalsea of our court of King's Bench, or his deputy, these, greeting. We command you to attach,” &c.

Upon an attachment there are two returns, either *non est inventus*, upon which the proclamation issues of course, or *cepi corpus* ; if *cepi corpus* be returned, the next step is to move for an *habeas corpus* to bring up the body, if he will not answer below ; for the sheriff has executed the command of the writ of attachment by taking the body, and he cannot carry him out of the county without the command of the king ; and if he should carry him out of the county without the king's writ, it would be an escape upon the *habeas corpus* : And in all cases where the sheriff does not make his return of the writ, if directed to him, this court will amerce him ; which ameracements are to be estreated in the exchequer, and are commonly 5*l.* : but it is usual to give the sheriff a day for that purpose, and if he do not by that time return the writ, the court setteth the amercement :

Gillb. Chan.
70.

Cary's Rep.
44. 77, 78.

ment: and sometimes the court, upon a notice of motion served upon the sheriff or his under sheriff, will order him to stand committed to the Fleet prison, for not returning the attachment or other process.

But if the attachment is directed to the sheriffs of *London* or *Middlesex*, or any other corporation who have a grant of the fines and amercements, as *London* and *Middlesex* have, and the party taken up upon the attachment*, and a *cepi corpus* returned; in that case the practice was formerly for the plaintiff to move for a messenger upon the *cepi corpus* returned, and at the time of making the motion the attachment and return was shewn to the court; and this was a motion of course upon which the court ordered the party to be taken into the custody of the messenger till he had cleared his contempt, and obeyed the further orders of the court. The reason of this proceeding was, because the estreats and amercements go to the sheriffs themselves, and there was no other way left to do justice to the plaintiff, but by ordering the defendant to be taken into the custody of the court's own officer; for the court cannot estreat the sheriff, as in other cases, for not making a return, or not bringing in the body, by reason the estreats in corporations which have a grant of the same, belong to such corporations; but the practice is changed in that

Gilb. Chan.
70.

* But vid. 1 Vern. 116. anon. where the Lord Keeper said, the officers of the city have not their own amercements. Vid. also 2 Will. 301. where Lord Chancellor King said, that if the sheriff (of London) had the body in his custody, the best way was to move that he may bring in the body; and which, if not done forthwith, he said, he would order the sheriff to pay the plaintiff all his costs.

respect,

2 Ark. 507.
anon.

respect, and it is now a motion of course upon a *cepi corpus* returned to send a messenger not only to those particular jurisdictions where the sheriffs are intitled to the amercements, but into every county generally without any restriction.

So where the plaintiff's bill was dismissed with costs, and the costs taxed, a *subpoena* was awarded against him to pay those costs; and for not obeying it an attachment, upon which attachment the sheriff of *Leicester*, to whom it was directed, took bail, and returned a *cepi corpus*.

Prec. in Ch.
331.
Gilb. 85.
Com. Rep.
264.
R. Raym.
723. contra.

And upon this return, a motion was made for a messenger to bring in the plaintiff; and it was urged to be the course of the court that a messenger should go in all cases where the sheriff takes bail, where the party is not bailable, as in this case he is not, and the rather, for that in this case the bail bond was taken of a member of parliament, against whom, the parliament being now sitting, they could have no remedy; and one *Hawkins's* case was cited, where in a like case a messenger was sent to bring in the party; and so it was ordered in this case.

2 Will. 657.

Attachments must be entered in the register's book, and the cause of issuing out the attachment also expressed: but the party who makes out the attachment usually first acquaints the adverse clerk in court, but this he need not do unless he pleases.

Finch, 253.

An attachment after a decree for dismissal is in nature of an execution at common law; and a general pardon may pardon the contempt, but not the debt.

If affidavit of service of *subpœna* be filed before the return of the attachment, the arrest holds good.

1 Vern. 172.

A solicitor must serve his client with the order for taxing his bill of costs, and the Master's report, whereby such costs are ascertained, before he can take out an attachment for them.

Barnard,
266.

Before the statute 1 Ann. c. 8. sec. 15. by the king's demise all process of contempt not executed became determined; so that the party suing out the attachment was under the necessity of beginning again; but by that statute, it is enacted, That no proceedings in any court of equity shall be determined, abated, or discontinued by the demise of any king or queen of this realm.

An attachment duly issued shall not be discharged but upon payment of the usual costs, and the costs of the succeeding process of contempt shall be double the former.

Pract. Reg.
21.

There must ordinarily be fifteen days between the *teste* and return of every such process of contempt, exclusive of the day of the *teste*, and inclusive of the day of the return, in proceedings to a sequestration, or to take a bill *pro confesso*, unless defendant live within ten miles of London, and then an order may be obtained by motion or petition to make the several processes returnable *immediate*; but if an answer be reported insufficient, or a plea or demurrer be over-ruled, then the process of contempt may be made returnable *immediate*, and served on the clerk in court, till the party arrive at such process as he was at before such answer, plea, or demurrer, put in; and the cause of the process issuing is indorsed on it.

1 P. Alen.
32.

Ord. Chanc.
29.
Pract. Reg.
109.

No

Ord. Chan.
225.

No process of contempt shall be made forth, and sent to the great seal, at the suit of any person prosecuting as plaintiff *in forma pauperis*, until it be signed by the six clerk who deals for him; and the six clerks are to take care that such process be not taken out needlessly, or for vexation, but upon just or good grounds, as they will answer it to the court if the contrary shall appear.

When a *cepi corpus* is once returned, there is an end of all manner of process; for no proclamation or commission of rebellion goes after that; and though a messenger of late years has been usually granted in such cases, yet he is but a new officer, and subordinate to the serjeant at arms; but regularly in such case, you ought to move, that the defendant may enter his appearance, and be examined in four days or stand committed.

2 Vern. 344.

If you make out an attachment returnable three or four days after the *teste*, if you arrest the body it is good, but if you suffer the return to expire and do nothing upon it, and then be obliged to make out another attachment, here you will be allowed but for one writ, in case you do any thing upon the second: and when the party is taken upon an attachment, he must pay costs, which are 13s. 6d. and enter into a bail bond, with two sureties in 20l. each, to the plaintiff to appear and answer, as the case is at the return of the writ, where the contempt is of a bailable nature: but where the writ is not executed, the costs are 11s.

Note, That the form of the attachment being "to answer the contempt he has been guilty of, and further to do and receive what the said

said court shall think proper." He must answer as well as clear his contempt at the same time.

The warden of the Fleet attends this court and the court of exchequer by two deputies, and therefore no attachment will lie against him; because he is supposed to be always personally court: a sequestration *nisi* for not putting in his answer, was moved for against the warden.

Per Cur. It is common to suspend clerks of courts, and the wardens of the Fleet; take the order for a sequestration, which is a kind of suspension *nisi*.

Mof. 238.

An attachment for non-appearance was taken out before the bill was entered in the bill book, though filed in the six clerks office.

The Lord Chancellor seemed to think an entry in the bill book necessary to give the party notice; for private notice to his attorney is not sufficient, but being doubtful of the course of the court, he referred it to a master.

It is not the practice now, as formerly, to take out a *subpœna* before the bill is filed.

1 Ves. 53.
54. anon.

If a man be in contempt to a serjeant at arms for want of an answer, and then puts in an insufficient answer, and the clerk in court accepts the costs of the contempt, this acceptance does not remit and purge the contempt; and in the process of contempt for the second answer, the plaintiff must begin again with an attachment (the first process), and cannot begin where he left off: but if neither the plaintiff nor his clerk in court does accept the costs of the contempt, for want of the first answer, although tendered, and the first answer be re-

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ported insufficient, the plaintiff may go on with the process for the second answer, where he left off at obtaining the first; and therefore upon the first answer coming in, it is usual and proper for the plaintiff's clerk in court to refuse accepting the costs of the contempt for want of the first answer, until he has seen and advised whether it be a full answer or not; it being a great delay to the justice of the court, after a first answer is gained, and the defendant is at the end of the line as to contempt, and that first answer proves immaterial, to put the plaintiff to begin his process of contempt again as *ab origine*.

* Will. 482.
Anon.

So in another case, subsequent in point of time to the preceding, the defendant was taken on a serjeant at arms for not putting in an answer; he afterwards put in an answer, and was discharged; the answer was reported insufficient, and he was taken again; and now moved to be discharged out of the custody of the messenger on paying costs of contempt; and the question was, Whether he should, before the further answer was reported sufficient or not?

Lord Chancellor: When the first answer is reported insufficient, and the party taken on process for not putting in a further answer; he afterwards puts in a further answer, and pays the costs of the contempt (for until then it is no answer), the course, I take it, is, that he must be discharged; and if the answer is afterwards reported insufficient, you may carry on the process of contempt at the process you left off: but I never heard that he should be in custody until the master reports whether the answer be sufficient or not; which may be reported
either

either way, and that after a long time. In case of an insufficient answer, you are to take up your process of contempt just where you left off, which would not be so, if he was to lie in custody during that time. And the motion was allowed.

2 Ves. 111.
Child v.
Brabson.
Ibid. Du-
port v.
Ward.

Before we conclude this chapter, it may not be improper to note the difference between a *capias* and an *attachment*: Upon a *cepi corpus* returned upon a *capias* at law, they amerce the sheriff if he does not bring in the body upon the statute of *Westminster* 2. c. 29.; and this is upon the words of the *capias*, which are, “*So that you have his body before us to answer A W of a plea of trespass upon the case.*” So that the command of the writ is not obeyed unless he hath the body ready. In an attachment, the form of the writ is, “*So that you have his body before us to answer us, as well of a certain contempt by the aforesaid A B against us committed, as is said, as what shall be then and there alleged against him; and further, to do and receive whatever our said court shall think proper in this behalf, and that you do by no means omit, and have here this writ.*” By which words it should seem, they might amerce the sheriff for not bringing in the body, as they did upon the *capias* at common law; but because the writ was originally founded upon a *contempt*, it seems that where the sheriff has taken up the body, he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol: and the statute of *Westminster* 2. only relates to original and judicial writs, and not to these prerogative processes, and there-

Gilb. Chan.
83.

fore they issued an *habeas corpus*, which is an undoubted writ within the statute, upon which it is proper to ground an amercement.

C H A P. VI.

Attachment with Proclamation.

IF a *non est inventus* is returned by the sheriff, and the party still persists in his contumacy, the next process is the proclamation; and this is a process issuing out of the extraordinary jurisdiction upon a *non est inventus* returned, commanding the party to appear in Chancery *sub pœnâ legianciæ*; so where a *non est inventus* is returned on a *capias* issued in criminal matters, the party is proclaimed, and if he does not come in on such proclamation, he is declared an outlaw: so if he contemned the extraordinary jurisdiction of the court of Chancery, he was proclaimed, and if he was not taken, or did not come in upon such proclamation, then he was deemed a rebel, and a commission of rebellion issued, as will be shewn in the next chapter.

Ibid. 73.

To obtain this writ, the attachment, with a return of *non est inventus* indorsed thereon, must be left with the clerk in court, who will thereupon make out the writ, and leave it with the bag-bearer of the Six Clerks office to be sealed. The form of the writ is as follows:

“George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To the sheriff of ——— greeting. We command you on our behalf to cause public proclamation

tion to be made in all places within your bailwick, as well within liberties as without, wherefoever you shall think it most convenient that A B do upon his allegiance, on (here insert the return) personally appear before us in our court of Chancery, wherefoever it shall then be: and nevertheless, in the mean time, if you can find the said A B to attach him, so as to have him before us in our said court, at the time before mentioned, there to answer to us as well touching a contempt which he hath, as it is alledged, committed against us, as touching those things which which shall be there and then laid to his charge; and farther to perform and abide such order as our said court shall make in this behalf. Witness ourselves, at *Westminster*, the — day of — in the — year of our reign."

To this writ subscribe the surname of the Master of the Rolls, and Six Clerk; and indorse it, "*By the court at the suit of ——— for want of an appearance, or for want of an answer (as the case is);*" and about the middle of the back of the writ, put the surname of the clerk in court that makes out the writ. It must be then entered with the register in the same manner as an attachment; and when it is sealed, the bag-bearer leaves it at the clerk in court's seat, and he sends it to the solicitor to be sent to the sheriff or other officer to whom it is directed.

When a party is taken up upon an attachment, he must pay costs, and either give his bond with sureties for his appearance, or enter his appearance with the register.

But after an attachment with proclamation, no commission to answer shall be granted, nor

Gilb. Chan.
71.

any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other good matter to satisfy the court touching that delay.

And the reason why upon the first contempt on the attachment they allow a commission to issue, or a plea or demurrer to be put in, is, because it does not appear to be an affected delay, and therefore upon tendering the costs of the attachment, the defendant may take his commission; and upon tender, the plea and demurrer are to be received: but if there regularly issues an attachment with proclamation, the defendant cannot of course purge his contempt by a mere tender, but he must apply to the court to shew that his plea and demurrer are proper, and to exhibit a proper excuse for the delay, that the court may see that there is no further likelihood of delay by the plea or demurrer put in, or by the commission to answer granted.

The present practice is upon payment or tender of the costs to the clerk in court, which upon an arrest are 1l. 3s. 6d. otherwise 1l. 1s. 6d. to enter an appearance; or if the process issued for want of an answer, upon the like tender or payment to move or petition for time to answer (and in a country cause for a commission to take the answer), stating the party is in contempt; but the court will not give the same time as if no contempt had been incurred.

C H A P. VII.

Commission of Rebellion.

THE writ of attachment with proclamations being also returned *non est inventus*, and defendant standing farther in contempt, a commission of rebellion may issue against him, which is a particular commission issuing under the great seal of the court, directed sometimes to the sheriff, but generally to commissioners jointly and severally, commanding them to attach, or cause to be attached A B, wherever he shall be found within the kingdom of *England*, as a rebel and contemner of our law, so that, &c.

This process is made out by the clerk in court, upon producing the writ of attachment with proclamations returned *non est inventus* by the proper officer. The form of the writ is as follows :

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To A B, C D, E F, and G H, greeting. Whereas by public proclamations made on our behalf by the sheriff of *Middlesex* in divers places of that county, by virtue of our writ to him directed, A B hath been commanded upon his allegiance personally to appear before us in our court of Chancery at a certain day now past ; yet he hath manifestly contemned our said command : Therefore we command you, jointly and severally, to attach, or cause the said A B to be attached, wheresoever he shall be found within our

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kingdom of *Great Britain*, as a rebel and contemner of our laws, so as you have him, or cause him to be before us in our said court, on ———, wheresoever it shall then be, to answer to us as well touching the said contempt, as also such matters as shall be then and there objected against him; and farther to perform and abide such order as our said court shall make in this behalf: And hereof fail not. We also hereby strictly command all and singular mayors, sheriffs, bailiffs, constables, and other our officers, and loyal servants and subjects whomsoever, as well within liberties as without, that they by all proper means diligently aid and assist you, and every one of you, in all things in the execution of the premises: In testimony whereof we have caused these our letters to be made patent. Witness ourself at *Westminster* this ——— day of ——— in the ——— year of our reign.”

To this writ subscribe the Master of the Rolls and Six Clerk's names as before, and indorse it, “*By the court. A commission of rebellion, for want of an appearance, (or for want of an answer,) at the suit of C D.*” And towards the bottom put the Six Clerk's surname, and after that the clerk in court's surname.

When you have made out the commission of rebellion, you must take two docquets thereof; one upon a half-sheet of treble sixpenny stamped paper, and the other upon half a sheet of paper unstamped; the form of which docquets are thus:

“The King, and so forth. A commission of rebellion directed to A B, C D, E F, and
G H,

G H, jointly or severally to attach J K, defendant, for want of an appearance (*or for want of an answer*), at the suit of L. M. plaintiff, returnable ——. Witness the King at Westminster the — day of — in the — year of his reign.

Here put the Master of the Rolls and Six Clerk's names; after that fold it up as you do an order, and on the back of the docquets write at the top, *Commission of rebellion, M against K*; and towards the bottom, the Six Clerk and clerk in court's surnames; and then give both these docquets, with the commission, to the bag-bearer, who will get that docquet that is stamped signed by the Lord Chancellor, and after that leave it with the clerk of the Hanaper-office, and the other left with one of the entering registers, who marks the docquet stamped with an *intratur*, before it be signed by the Lord Chancellor.

This writ is usually directed to such commissioners as the plaintiff names, which are commonly four or more, as the plaintiff or solicitor shall chuse: and if the party be taken in or near *London* in term, or the time of the public seals, they are to bring him to the Fleet: 95. Pract. Reg. but if the return be of any long distance, and the party offers good bail, the commissioners ought to take it, and not to keep him lingering in prison, in their houses. 2 Chan. Rep. 262.

If the commissioners refuse to return the writ, the court on motion or petition will order them to return it; which order, if upon service they obey not, process of contempt may issue against them. And where private persons are made commissioners, if they take

Toth. 38,
39.

The bond may be taken in the name of the Master of the Rolls, or any two of the Masters in Chancery, which are allowable and good by the practice of the Court of Chancery.

* Query, Whether the assistance or presence of a peace officer is absolutely necessary; but it is not advisable to proceed to such extremity without him.

† Moor, 668. Cro. Eliz. 908. 5 Co. 91. Yelv. 28. Co. ent. 12.

‡ Gilb. Chan 76. Dal. Sheriff, 353.

the party and suffer an escape, the court, on affidavit and motion, and a day given to shew cause to the contrary, will order them to be committed, till they bring in or pay the debt: and therefore it is necessary and usual for the commissioners to take a bond from the person so in contempt, with one or more sureties, to the Master of the Rolls, with condition for his appearance, unless it be for payment of money decreed, or not performing a decree; in which case, the commissioners ought not to take bail, nor suffer the defendant to enter his appearance with the register; but the commissioners ought to bring the defendant into court, and have the court moved, that the defendant may be turned over to the Fleet prison, where he is to remain till he has paid the money or performed the decree, and cleared his contempt; and then the court will order him to be discharged; and if any person shall rescue him, the court will order the rescuer to stand committed.

The commissioners have power by their commission, to call to their assistance any person or peace officer to assist them in taking the rebel; and they may, with the assistance of a peace officer*, break open his house to take him, by reason of his contempt to the king and the law; which they cannot do upon an attachment, or attachment with proclamation†; for where you are to take the party as a contemner of the law, the design of the writ is, that he shall not be any where protected by the law; and therefore it implies an authority to enter into the house‡.

And this is indeed the reason why this process is directed to commissioners under the great seal,

feal, and not to the sheriff: because the sheriff cannot be supposed to execute all such process in person; and it may be inconvenient to trust so great a power with the deputies of the sheriff's nomination; and therefore this court appoints its own commissioners, who are enjoined to do every thing very carefully, and are answerable to the court for their miscarriages: and therefore if an action at law be brought for an assault and battery or false imprisonment, in executing a commission of rebellion, an injunction will be granted, because the irregularity ought to be punished in this court, and can only be determined and examined here; for at law, supposing the commission issued regularly, they will not take that as a justification. 1 Vern. 269.

A commission of rebellion may be executed on a *Sunday*, though it issued for want of an appearance, or an answer only: and a justice of the peace has no power to bail a man taken upon this commission. Arg. ex parte, Whitchurch. 1 Atk. 56.

57. Note, in this case, the petitioner was arrested upon a Sunday by the Lord Chancellor's tipstaff, under the warrant of the court, for a contempt in disobeying an order; he now prayed to be discharged, insisting his arrest and commitment to the Fleet was illegal, being contrary to the 29 Car. 2. c. 7. sec. 6. Lord Chancellor was doubtful at first, but on consideration thought it a lawful arrest, though on a Sunday. Lord Chief Justice Holt was inclined to think, that a man may be taken upon a process of contempt on Sunday, because it was in the nature of a breach of the peace, and an exception out of the act of parliament. Cases in King William's Time, 348. Vid. also 6 Mod. 95. Cath. 504. Salk. 626.

C H A P. VIII.

Serjeant at Arms.

THE office of serjeant at arms is by patent from the king for life; and his office is to attend upon and bear a gilt mace before the Lord

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Lord Chancellor, or Lord Keeper, or Lords Commissioners for the custody of the great seal, and to execute all warrants granted against any person, after he has stood out a commission of rebellion; or to bring up, by order of court, any one that is in custody of a sheriff or other officer, who has returned a *cepi corpus* upon a process of this court, and brings not in the party, and to take into custody any other person upon an order of this court; and this officer has several deputies, some of whom are used as, and called messengers (as is said) before a commission of rebellion, others upon or after a commission of rebellion, and are called by the name of their superior.

Pract. Reg.
332.

The next process then after a commission of rebellion is a serjeant at arms; and that is granted upon motion on the return of *non est inventus* upon a commission of rebellion; and the reason why this process is obtained upon motion, is, because there is nothing to issue under the great seal; and therefore there being no process under the great seal to make it a record of the court, there must be an act of the court to send the serjeant at arms: and when a serjeant at arms is moved for, upon a commission of rebellion returned, the commission of rebellion is always produced, and is in the hands of the counsel who makes the motion, and he delivers it into court to be left with the register.

Before a sequestration can issue, a *non est inventus* must be returned by the serjeant at arms, unless the party be a peer or peers of the realm, a member of the House of Commons, or an absconding defendant proceeded against according to the statute 5 Geo. 2. c. 25.; and the

the reason of this seems to arise, in the first place, from the humane presumption of the court, that no person could be found so inattentive or indifferent to their own interests, as obstinately to persist in his contumacy, and permit a process, so severe in its consequences as a sequestration, to issue against his effects, rather than appear in obedience to the orders of, and abide by the judgment of the court; and, secondly, perhaps, from an inclination of the court to attribute the failure of the three first processes in effectuating the purport for which they issued, to the negligence or other default of the ordinary officers or ministers of justice intrusted with the execution of the same; or from a suspicion arising from the possibility that the commissioners in the commission of rebellion, nominated by the complainant himself, might be so far prejudiced in favour of their employer as not to execute their commission with fidelity; the court therefore, for one or other of these reasons, never permits the process of sequestration to issue till it is thoroughly satisfied, by the *non est inventus* being returned by its own officer, that the contumacy of the defendant is a wilful one, and the consequence of his own default.

After any order for a serjeant at arms shall be granted, the register shall draw up the same, and at the request of the serjeant at arms deliver it to to the serjeant or his deputy; and the said order is not to be discharged, nor the contempt thereupon, without the serjeant's fees be paid, and a certificate under his hand testifying the same. *Vide Ord. Can. 4 Nov. 26 Car. 2. 1674.* And this order is revived by order, bearing date *July 13. 1 Jac. 2. 1685.* This farther

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farther order is also revived by an order of the 12th of *June 6 W. 3.* 1694. whereby it is likewise ordered, that the counsel moving for a serjeant at arms shall immediately, in court, deliver to the register the commission of rebellion, and if required, name the clerk in court.

By order, bearing date *May 13. 7 Geo. 1.* 1721. upon the petition of the serjeant at arms, setting forth that he is intitled to take all persons into custody who stand in contempt to a commission of rebellion; his Lordship declared, that no sequestration can regularly issue to sequester the estate of any person who cannot be found, but upon the return *non est inventus* of the serjeant at arms; and therefore ordered, that from thenceforth, where any person was in contempt, either for want of an appearance or answer, or for not yielding obedience to any order or decree of this court, (unless for contemptuous language, or the beating or abusing any person in the service of the process of this court, or other contempts of the like nature,) the serjeant at arms should apprehend and bring the contemner to the bar of this court to answer such contempt; but if the contemner could not be found, then to return *non est inventus*, to the end a sequestration might regularly issue, according to the ancient usage and practice of this court; and that process should for the future issue accordingly; and that it should be made a part of all orders for giving time to answer, or for doing any other act, upon the party's entering his appearance with the register; that the party, when he enters such appearance, should likewise consent that a serjeant at arms should go against him, as upon a commission of rebellion returned *non est inventus*,

thus, in case of non-compliance. And the said order was ordered to be hung up in the Register's and Six Clerk's office, that all persons might take notice thereof, and yield obedience to the same.

Note, These different orders seem to have been made in consequence of some abuses (which had crept into the practice of issuing sequestrations) prejudicial to the serjeant at arms *.

* Vid. *Prec.*
in Chan.

553, 554,
555. *ex parte*
Jephson, in
which the
abuses com-
plained of
are set forth
at large.

The order for the serjeant at arms being drawn up, passed, and entered, the clerk in court or solicitor gives it to that officer, who procures a warrant thereon, signed by the Lord Chancellor; and at the return thereof certifies in what manner he has acted under it. The return which he makes upon the back of the warrant must be filed at the report office before a sequestration can regularly issue: and the costs are not settled as upon the former processes, but are to be taxed by the clerk in court for the plaintiff and defendant, and are according to the distance the serjeant has to seek for the party: and the party taken upon this process must clear his contempts, and pay the costs, before he can be released; and if it be in execution, he must be detained in custody and brought into court, and, upon motion, committed to the Fleet until he perform the matters decreed.

3 Atk. 569.

C H A P. IX.

Sequestration.

See in 1 Ch.
Cas. 91.
Hyde v. Pe-
tit of the
Rise and
Progress of
Sequestra-
tions.

Vide p. 17.

IT has been already observed in the introductory part of this work, that violent was the struggle between the courts of law, and of equity, before this process obtained its final establishment; and the arguments which were adduced against the exertion of this extraordinary power by the court of Chancery, and those which the advocates for its establishment resorted to in support of it, having been before mentioned at large, a repetition of them in this place will be unnecessary.

The process of sequestration therefore is a writ or commission sometimes directed to the sheriff, but which is most usual, to four or more commissioners of the complainant's own nomination, authorising them to enter upon the real and personal estate of the defendant, and take the rents, issues, and profits into their hands, and keep possession of, or pay the same as the court shall order and direct, until the party who is in contempt shall do that which he is enjoined to do, and is specifically mentioned in the writ: and this writ may be moved for upon a *non est inventus* returned by the serjeant at arms; when, upon producing his certificate of such return, which is in the hands of the counsel making the motion, the same is granted of course: and the order for a sequestration being drawn up, passed, and entered, is to be left with the plaintiff's clerk in court, together with the names of the persons whom the

plaintiff

plaintiff chuses to have inserted as commissioners, and the clerk in court will make out the writ, the form whereof is as follows :

“ *George* the Third, by the Grace of God,
of *Great Britain, France, and Ireland*, King,
Defender of the Faith, and so forth, To ——— Here name
Whereas A B complainant exhibited his bill of the commis-
complaint in to our court of Chancery against sioners that
C D defendant ; and whereas the said C D are seques-
being duly served with a writ issuing out of trators.
our said court, commanding him, under the
penalty therein mentioned, to appear to and
answer the said bill, hath refused so to do, and
thereupon all process of contempt hath issued
against him unto a serjeant at arms : And
whereas the said C D hath of late asconded,
and so concealed himself that the serjeant at
arms hath not been able to find him, as by
the certificate of the said serjeant at arms ap-
pears : Know ye therefore that we, in confi-
dence of your prudence and fidelity, have gi-
ven, and by these presents do give to you, any
three or two of you, full power and authority
to enter upon all the messuages, lands, tene-
ments, and real estate whatsoever, of the said
C D, and to take, collect, receive, and seques-
ter into your hands, not only all the rents and
profits of the said messuages, lands, tenements,
and real estate, but also all his goods, chattels,
and personal estate whatsoever : and therefore
we command you, any three or two of you,
that you do, at certain proper and convenient
days and hours, go to and enter upon all the
messuages, lands, tenements, and real estate of
the said C D ; and that you do collect, take,
and get into your hands, not only the rents
and

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and profits of all his said real estates, but also all his goods, chattels, and personal estate, and keep the same under sequestration in your hands until the said C D shall fully answer the complainant's bill, clear his contempts, and our said court make other order to the contrary. Witness ourself at *Westminster* the — day of — in the — year of our reign."

To this subscribe the Master of the Rolls and the Six Clerk's surnames, and indorse thus: "*A commission of sequestration against C D defendant, at the suit of A B complainant.*" The clerk in court gives this commission to the bag-bearer of the Six Clerk's office, to be sealed; which being done, he leaves it at the clerk's seat in the office, to be given to the solicitor when he calls.

The commission of sequestration being sealed, the sequestrators therein named proceed to seize and sequester the real and personal estate of the party against whom the commission of sequestration issues: and the plaintiff's counsel may move and obtain an order for tenants to attorn and pay their rent to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and keep the money in their hands, or bring it into court, as the court shall direct: and these commissioners are accountable to the court, and are to act in the execution of their office according to the directions of the court; and they are to make returns from time to time, of what they have seized, as the court directs; and are to account for what comes into their hands, and to bring the money into court, as the court shall direct, to be put out at interest, or otherwise as shall be found necessary: but this money is not usual-
ly

ly paid to the plaintiff, but is to remain in court till the defendant has appeared, or answered and cleared his contempts; and then, whatever hath been seized by virtue of the sequestration shall be accounted for and paid to him; however, the court hath the whole under its power, and acts therein according to the equity and circumstances of the case.

It was moved, that the *irregularity* of a sequestration might be referred to the *deputy*, which was taken out against the defendant for not appearing, by reason of its being taken out sooner than by the course of the court it could; and yet the sequestrators had taken the goods off the premises, and threatened to sell them. The Chief Baron said, That as to the carrying the goods off the premises, it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a *disfringas* at law. But the court agreed, that the sequestrators could not sell the goods.

M. 1729.
in Scac'.
Barnard.
Rep. in B.
R. 212.

Where sequestrators seize the real estate of the party, any person who claims title to the estate so sequestered, either by mortgage or judgment, lease, or otherwise, or who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such title; but may move the court, as of course, to be examined *pro interesse suo*: And in this case the plaintiff is to exhibit interrogatories in order to examine him, and for a discovery of his title to the estate; and he may be examined thereon accordingly; and the master must state the same to the court, and the parties may enter into proof touching the title to the estate in question; and when the master hath stated the whole matter, the court gives judgment upon

Vid. Whar-
ran v.
Broughton,
1 Ves. 180.
where this
proceeding
seems recog-
nized.

the report: And if it appears that the party who is examined *pro interesse suo*, hath a plain title to the estate, and is affected with the sequestration, then it is to be discharged as against him, with or without costs, as the court sees fit upon the circumstances of the case: And there may happen other circumstances and proceedings upon a sequestration, which cannot fall within the general rule here laid down, and which must be determined according to the nature of the case, and as it appears to the court.

Where a suit is for lands, a sequestration will be granted of all the party's lands, tenements, and hereditaments, with an injunction for the profits of the lands, tenements, &c. to be delivered to the plaintiff, by the sheriff or the commissioners for that purpose named in the commission of sequestration: And an injunction upon a sequestration is the utmost process that this court can issue for contempt of non-appearance, &c.

A sequestration may be granted either before or after hearing: and it may be granted against an infant for non-appearance; and also against a peer.

² Chan. Caf.
163.

In Chancery, not only the body of the defendant, but also his lands and goods, are liable to a sequestration: but no sequestration lies till the time for the return of the attachment is out, on which the body was taken; for till then he may clear the contempt, or if for disobedience to a decree, he may perform it. But it is reasonable sequestration should lie in case one taken into custody by process of Chancery, continues in prison without paying his debts.

Vid. 3 Will.
Rep. 240,
241.

A se-

A sequestration is usually had of both lands and goods, where the thing decreed is a personal duty.

1 Chan. Caf.
92.

And it hath been sometimes granted for money of the parties in other men's hands.

Toth. 173.

The court of Exchequer granted a sequestration after a decree for a *personal* duty.

2 Freem.
Rep. 99.

A sequestration was granted against the Countesses of *Shaftsbury* and *Gainsborough* for the contempt in contriving and effecting the marriage of the Earl of *Shaftsbury*, an infant, with the Countess of *Gainsborough*'s daughter, without consent of his guardian, named by his father's will, and without applying to the court.

2 Will. 110.

This process is like an outlawry at common law; so that if a defendant who cannot be found to serve process upon, is proceeded against to a sequestration, and does not then appear, you may proceed against the rest.

1 Chan. Caf.
139.

Where lands of the husband, out of which an annuity to the wife issued, were sequestered; the husband dying, the sequestration was discharged as to the annuity.

1 Ch. Rep.
247.

If a party does not obey a decree, all process of contempt may issue against him; and, if not taken, the court will grant a sequestration. So if he be taken and lie in prison, obstinately refusing to perform the decree, the court will grant a sequestration.

2 Ch. Rep.
151.

A voluntary and fraudulent conveyance, to avoid an approaching sequestration for a personal duty, is no bar to the sequestration.

2 Chan. Caf.
46.

Upon an affidavit that the defendant was gone to *Holland* to avoid the plaintiff's demand; and he having before been arrested upon an attachment, and a *cepi corpus* returned by the sheriff, the court, upon motion, granted a

serjeant at arms against him ; and upon the re-

turn thereof, a sequestration.

1 Vern. 344.

1 Vaugh. 58.

Sed vide

1 Vern. 118.

166.

3 Atk. 594.

Hawkins v.

Crook ; but

vid. 2 Will.

621.

1 Vesf. 181.

where it is

held *contra*.

A sequestration that issues as a mesne process of the court, will be discontinued, and determined by the death of the party ; but where a sequestration issues in pursuance of a decree, and to compel the execution of it, there, though the same be for a personal duty, it shall not be determined by the death of the party.

A sequestration binds from the very time of awarding the commission, and not only from the time of executing it, and its being laid on by the commissioners ; for if that should be admitted, then the inferior officer would have

ligandi & non ligandi potestatem.

1 Vern. 58.

The party who takes out a sequestration, shall not be answerable for the acts of the sequestrators, for they are the officers of the court.

1 Vern. 160,

161.

If a necessary defendant is prosecuted regularly to sequestration, plaintiff may go on against the other defendants ; but serving a *subpœna* at a place where he had only once lodged, and that two years before the service, is not good.

Prec. in

Chan. 99.

Sequestrators on a mesne process are accountable for all the profits, and can retain

only so far as to satisfy for the contempts.

1 Vern. 248.

Care ought to be taken that the commissioners in sequestrations be such as are able to answer for what shall come to their hands, in case they should be called to an account.

The sequestrators, after they have sequestered part of the estate, may not sell it without leave of the court ; and they are to behave themselves in all other acts relating to their office, as the court shall direct.

A se-

A sequestration is the *first* process against a peer, or member of the House of Commons; but if there be an order for a sequestration *nisi* against a peer, for want of an answer, and the peer puts in an insufficient one, yet the order for a sequestration shall not be made absolute, but a new order for a sequestration *nisi* shall be made.

Mich. 1726.
Lord Clif-
ford's case,
2 Will. Rep.
385.

When application is made for a sequestration to the foreign plantations, it ought to be to the king in council.

2 Will. Rep.
262.

A sequestration before marriage, and the plaintiff marries and dies, shall not take place of the wife's dower.

Vern. 118.
C. 106.

This writ is not to be granted without oath.

Skin. 136.

Sequestrations run upon copyholds.

After goods, or a real estate are seized upon a sequestration for want of an answer, the plaintiff may still proceed till he has got the bill taken *pro confesso*.

Vide 1 Bar-
nard. Rep.
in Ch. 431.

2 Atk. 22.
Davis v.
Davis.

An exception was taken by a sequestrator to a master's report, because he had not allowed him 6s. 8d. a day for his trouble.

Lord Chancellor: I do not remember that 6s. 8d. a day is an absolute stated fee to all sequestrators, whether the effects seized under the sequestration are large or small; and as the sequestrator, in this case, has got in 40l. in almost two years, I think the gross sum the master has allowed him sufficient for his trouble.

2 Atk. 557.

Papers had been delivered out several years ago, for the purpose of being examined; and some time since an order had been obtained that they should be restored. Application had been made for the return, and refused. The order had been served personally, but no writ

1 Brown's
Chan. Rep.
434.

of execution of the order had been served or
fued out. A sequestration *nisi* under these cir-
cumstances was moved, and the rule was grant-
ed as of course.

Vide also
1 Chan. Rep.
152. 2 Ch.
Rep. 151.

A motion for a sequestration against a pri-
soner in the Fleet, for not paying the rents and
issues of an estate to a receiver appointed by a
decree of this court, was denied by my Lord
Keeper Henley, his Lordship being of opinion,
it was too much for a court of equity to order
double execution.—Note, The Register pro-
duced a precedent of such an order made by
Lord Chancellor *Hardwicke* on a like occa-
sion; but his Lordship thought the circum-
stances of the present case very different; and
this was between the Attorney General and
Tancred at the last seal before Hilary Term
1758.

3 Atk. 740.
Butler v.
Rashfield.

If there be a sequestration *nisi*, for want of
an answer, against a member of the House of
Commons, and he puts in an answer before the
order is made absolute, and exceptions are ta-
ken to the answer, the court will enlarge the
time for shewing cause, till it appear whether
the answer is sufficient.

1 Ves. 180.
Wharram v.
Broughton.

It is not of a great many years standing that
the court has ordered goods to be sold, to sa-
tisfy payment after a decree; but it is very
lately that the court has ordered it for a colla-
teral contempt in proceedings before a decree,
which the court does now in aid of its proceed-
ings.

If the sequestration be after a decree for mo-
ney, it is usual to grant it of the land out of
which, &c. and of all other the party's real and
personal estate, the rents and profits to be paid
the party to whom the money is decreed, till the
money

money and costs are satisfied: and if the decree be of lands also, the court grants an injunction for the possession of the lands.

Pract. Reg.
320.

A sequestration hath been sometimes granted for money of the parties in other men's hands.

Toth. 173.

When the defendant stands out all process of contempt, and cannot be found by the serjeant at arms, or resists the serjeant, or makes *rescous*; a sequestration shall be granted of the land in question: and if the defendant do not render himself within the year, then an injunction shall be granted for the possession.

Ibid. Pract. Reg. 330,
331.

When process is carried on to a sequestration against lands of the father, and he dying, it may be had against the same lands in the hands of the heir: but it hath been held otherwise when the decree was for a personal duty only*.

* 2 Chan. Rep. 244.
Vid. alio Wharram v. Broughton,
1 Ves. 180. to the same purpose; but vid. alio 3 Atk. 194.
contra.

Where lands of the husband, out of which an annuity to the wife issued, were sequestered; the husband dying, the sequestration was discharged as to the annuity.

1 Chan. Rep. 247.

A voluntary and fraudulent conveyance to avoid an approaching sequestration for a personal duty, is no bar to the sequestration.

2 Chan. Caf. 46.

Of the Writ of Distringas.

WHEN a corporation aggregate is made defendant to a bill, and refuses to appear to, or answer the same, or perform the decree of the court, being (as Sir *Edward Coke* says) invisible and existing only in intendment and consideration of law, it cannot be attached; and therefore, instead of an attachment, the process which is used to enforce from a

10 Rep. 32,

The Practice of the

corporation an appearance to a bill, or an obedience to the decree or orders of the court, is a *distringas*, which is directed to the sheriff of the city or county wherein such corporation is resident; this writ is made out by the clerk in court, a proper affidavit of service of the *subpoena* being left with him, the form whereof is as follows:

“ George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth: To the sheriff of the county of ———, greeting. We command you to make a distress upon the lands and tenements, goods and chattels, of ——— within your bailiwick, so as neither the said ———, nor any other person or persons for them, may lay his or their hands thereon until our court of Chancery shall make other order to the contrary; and in the mean time, you are to answer to us for the said goods and chattels, rents, and profits of the said lands, so that the said ——— may be compelled to appear before us in our said court of Chancery, wheresoever it shall then be, there to answer to us, as well touching a contempt, which they, as it is alledged, have committed against us, as also such other matters as shall be then and there laid to their charge; and further to perform and abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you. Witness ourself at Westminster the ——— day of ——— in the ——— year of our reign.”

Indorsed, “ By the court, at the suit of A B, for want of an appearance, or answer (as the case is).”

This

This writ must also be entered with the register in the same manner as an attachment; and this writ when sealed must be delivered to the sheriff, who is bound to make a return thereof after it is returnable; and there must be fifteen days between the *teste* and return.

When the sheriff has made a return, and the corporation stands out in contempt, you carry it to your clerk in court, who thereupon makes an *alias distringas*, which is the same with the *distringas*, with this difference, that after the words, "*We command you*," add the words, "*as we have before commanded you*," to make a distress upon the lands and tenements, &c.; and then deliver this *alias distringas* to the sheriff, who must make a return thereof; and there must be fifteen days between the *teste* and return: and after this is returned, and the corporation still persists in its contempt, you carry the return to the clerk in court, who thereupon makes out a *pluries distringas*, which is the same with the *distringas*, with this difference, that after the words, "*We command you*," add the words, "*as we have twice before commanded you*," to make a distress upon the lands, tenements, &c.

When this is returned by the sheriff (and there must be fifteen days between the *teste* and return), a sequestration may be moved for against all the lands, tenements, goods, and chattels of the said corporation; which sequestration cannot be discharged till the corporation has performed what it is enjoined to do, and pay the costs of the several *distringases* and the sequestration, and the commissioners their fees for sequestering; and then it will be a motion of course to discharge the sequestration.

Note,

The Practice of the

Note, Upon the first writ the sheriff generally levies 40s. issues, upon the *alias distringas* 4l.; on the *pluries distringas*, he levies the whole property; and on the return of the *pluries*, a sequestration is granted.

When a sequestration is once awarded against a corporation, it can never after come and pray to enter its appearance, as it might have done on the *distringas*, which issues for that very purpose to compel from the corporation an appearance; but the appearing being past, the process must go on, because the appearance being only in favour of liberty, can be of no service to a corporation which cannot be committed: and though the service of the writ of execution of a decree against a corporation, was upon the governor of the company only, who has no power over the company's cash, and could not pay the money decreed; and it was said, that service ought to have been on the committee; but this was over-ruled, for then if the committee would not meet, or not admit the party in to serve them, there could be no service.

Proc. in Ch.
129, 130,
331.
Harvey v.
East India
Company.
Vide also
2 Vern. 395.

Toth. 7.

When corporations are sued here in their political capacity, they answer under the seal of the corporation: and must sue and defend by attorney; but if all those of which the corporation consists, be charged as private persons, they must answer upon oath.

Having now considered the several processes of contempt in use in this court, it may not be improper to treat of the nature of contempts in general, and to shew what circumstance or act of a party constitutes a contempt.

Of Contempts in General.

A CONTEMPT is a disobedience to the court, by acting in opposition to the authority, justice, or dignity thereof: and it commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court; sometimes a contempt is incurred by opposing the execution or service of the process of the court, or using force to the party that serves it, or by speaking in terms of scorn, reproach, or diminution of the court; or of its process, orders, officers or ministers executing or serving such process or orders: ^{Pract. Reg. 99.} so it is a great contempt to terrify a witness ^{Ibid. Toth. 33.} that is to be examined, or to forge or counterfeit the process or seal of the court.

Where oath is made of a misdemeanor in beating or abusing a person serving any process of this court, the person offending is to stand committed upon motion, and must answer the contempt *in vinculis*; and it is conceived, that, in this case, the oath of the party is sufficient to ground the attachment against the offender, for who is to prove the abuse, but the party abused? he may attend the court, and shew every wound and hurt he has received: and this abuse is often done in so private a manner, that there is no way left to prove it, but by the oath of the party abused; and if this should be discouraged, no process of the courts would ever be served; and the court are bound to justify their own honour and authority in this particular point. But a
peer

The Practice of the

peer may abuse, &c. as often as he pleases, for his person being sacred, he is out of the reach of the court, and they cannot come at him, as in the case of a commoner. This was so in the case of *Denne* and Lord *Delaware*, where the party was abused in the service of the process of the court, and went without remedy.

So where affidavit is made by a person, of scandalous or contemptuous words against the court or the process thereof, the party offending shall be committed on motion, and must answer his contempt *in vinculis*. And in this last case, a single affidavit is always thought sufficient to ground an attachment *nisi causa* on, and to give the defendant a day to shew cause.

If any suitor of the court is arrested in the face of the court, or as he is going or coming to attend his causes, (for so far the court does and will protect a man) upon complaint made thereof, sitting the court, they will send out the tipstaves to bring in the bailiffs and prisoner instantly, and will order them forthwith to discharge him; and the plaintiff in the action, on complaint and oath made thereof, will certainly stand committed, and he shall lie by it till he petitions, submits, begs pardon, and pays costs to the other party.

Where a clerk in court or solicitor is committed for male-practice or misbehaviour of his known duty, after he has laid in custody some time, the court will discharge him upon a petition signed by him, wherein he must beg pardon, be sorry for his contempt, and pay the costs.

All process made upon any contempt is to be made out into the proper county where the party is usually resident, unless he shall be at that time occasionally in or about *London*; in which case it may

may be directed into the county where he shall then be, that it may be served upon him there : and he who prosecuteth for contempt, is to do his best endeavour that the precedent process be duly executed : and if a party arrested upon a proclamation, or commission of rebellion, or by the serjeant at arms, shall make it appear unto the court by proof, that the prosecutor of those processes hath not done his best endeavour to have the precedent process duly executed, then the party so offending shall pay the other party costs.

Ord. Chan.
Nov. 17.
7 Car. 1631.

And if any person shall be taken upon process otherwise, or any way irregularly issued, the party so taken, first appearing unto, and satisfying the process which had irregularly issued against him, shall be discharged of his contempt, and have his full costs to be taxed of course, either by the master, or by the six clerk, not towards the cause, for such irregular prosecution, from the time the error first grew.

All attachments on process shall be discharged upon the defendant's payment, or tender to the plaintiff's clerk, and refusal, of the ordinary costs of the court ; and filing his plea, answer, or demurrer, as the case regularly requires, without any motion in court, or petition on that behalf.

And if after such conformity, and payment of costs (or tender and refusal, as aforesaid), any farther prosecution shall be had of the said contempt, the party prosecuted shall be discharged with costs.

And where a contempt is prosecuted against any man, he shall not be put to move the court, as was formerly used, either for interrogatories to be exhibited, or for reference of his examinations, or for his discharge when examined ; but
when

when he shall be brought in by process, or shall appear *gratis* to be examined upon a contempt, he shall only give notice of such his appearance to the attorney or clerk on the other side.

And if within eight days after such appearance, and notice given, interrogatories shall not be exhibited whereon to examine the party; or if no reference be procured of his examination, nor commission taken out on the other side, nor witnesses examined in court, to prove the contempt within one month, then the party thus prosecuted ought to get an order to be discharged, and for a master to tax the costs.

If after appearance, and interrogatories exhibited as aforesaid, the party appearing shall depart before he is examined, without leave of the court; upon motion, and certificate of the same, &c. he shall stand committed without farther day to be given him; and is not to be discharged from his contempt, until he has been examined, and is cleared thereof.

And if he shall, upon his examinations, or by proofs, be found in contempt, and thereupon committed, he shall clear such his contempts, and pay the prosecutor his costs before he be discharged of his imprisonment.

And though he be cleared of his said contempt, yet he shall have no costs, in respect of his disobedience in not submitting to be examined without the prosecutor's trouble and charge in moving the court.

All persons guilty of any breach of the orders of the court, may be committed for the contempt, which is to be examined into upon oath on interrogatories; and if the contempt be found, the parties must clear it, and pay costs to the prosecutor.

There

There are three different sorts of contempt: one kind of contempt is scandalizing the court itself; there may likewise be a contempt of court in abusing parties who are concerned in causes here; so there may also be a contempt of this court, in prejudicing mankind against persons before the cause is heard; and there cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

2 Atk. 472.

So the case of *Raikes*, the printer of the *Gloucester Journal*, who published a libel in one of the *Journals* against the commissioners of charitable uses at *Burford*; calling his advertisement *a hue and cry*, after a commission of charitable uses, was held to be a contempt of this court, and the court committed him.

There are several other cases of this kind; one strong instance where there was nothing which reflected upon the court, in the case of Captain *Perry*, who printed his brief before the cause came on; the offence did not consist in the printing, for any man may give a printed brief, as well as a written one to counsel; but the contempt of this court was prejudicing the world with regard to the merits of the cause before it was heard; so publishing a paper taxing parties in a cause then depending in this court with turning affidavit-men, was held to be a contempt of court, and the publishers committed to the Fleet.

Ibid.

When a man is imprisoned upon mere contempts past, he may be discharged *ex gratia* after sufficient imprisonment, or he may be otherwise dispensed with; but where he is imprisoned for non-performance of any order of court,

Prac. Reg.
101.

court, still in force, between parties, the contemnor is not to be discharged till he has yielded obedience; but the court may dispense with the performance of the order for a time; and such as are brought in upon process of contempt, must (if they will have their liberty) enter into bond to appear *de die in diem*, and not to depart without leave of the court; or else they will be committed to the Fleet.

As to contempts against an order, the party must commonly be served with the order under seal, before he can be brought into contempt for not obeying it; but if the party was actually present in court when the order was pronounced, or if he be an officer of the court, as a solicitor it may be otherwise; and if the fact be against a standing order of the court, there needs no notice of it; or if it be proved that the order under seal being left with a servant, &c. came to the party's hand, that may be a sufficient foundation for a contempt.

Ord. Chanc.
139.

When a party prosecuted on a contempt has denied it, or it does not clearly appear by his examinations, the prosecutor may take out a commission of course, to prove the contempt; and in such case the party prosecuted may name one commissioner to be present at the execution of the commission; and may cross examine the witnesses produced against him to prove the contempt; but he is not to examine any witnesses on his part, unless he shall satisfy the court touching some matter of fact necessary to be proved for clearing the truth; and then he is to examine them only to such particular points set down, and the other side may also examine them; and the interrogatories on both sides are to be included in the commission.

Where, upon a *subpœna ad respondendum*, the party upon his examination sweareth he was not served; if, upon a commission to examine to the contempt for not appearing, the party that served the *subpœna*, (so that he be not the plaintiff himself,) depose that he personally served the defendant himself; this is sufficient proof: so where an affidavit of service of an injunction is made, and the party in contempt doth on his examination deny the service; if, upon a commission to prove it, one witness swears the service, that coupled with the affidavit is sufficient proof of the contempt; but to prove a contempt in not obeying a decree, it is said there must be two witnesses.

Where a contempt is prosecuted against one, who by reason of age, sickness, or other cause, is not able to travel; or against many persons who are servants or workmen, and live a great distance from the court; upon motion on affidavit of such facts, the court will grant a commission to examine them in the county, which shall be sued out and executed at the charge of the person desiring it, directed to such indifferent persons as the prosecutors of the commission shall name, (as in other cases,) and only one commissioner at the nomination of the party prosecuted; which commission must be executed in such convenient time and place as the six clerk, (not towards the cause) upon hearing the clerks in court on both sides shall fix upon.

Ord. Chanc.
140.

A contempt in not appearing or answering is commonly a good cause to grant or continue an injunction; and where one in contempt had on motion got an order made in his favour, the court upon motion dismissed it.

VOL. I.

T

Of taking Bills pro Confesso.

IT has been already observed, that if a defendant absconds to avoid being served upon a positive affidavit of the fact, the court upon motion will fix a day for him to appear, which order must be inserted in the Gazette, &c. in pursuance to the act of 5 George 2. c. 25. and if the defendant refuses to appear upon affidavit thereof, the bill will be taken *pro confesso*.

Lately the practice has been, that if a defendant appears to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced and taken *pro confesso*; but if time be given to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*: this practice of taking a bill *pro confesso* is not of long standing, the custom formerly being to put the plaintiff to make proof of the substance of the bill, though the defendant stood out to the last process, a sequestration*; and this method of taking a bill *pro confesso* is consonant to the rule and practice of the common law, where, if the defendant makes default by *nihil dicit*, judgement is immediately given in every case when the thing demanded is certain; but when the matter sued for is uncertain, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain damages, and then follows the judgment final.

If the defendant appears to the *subpoena*, and prays a further time to answer, and has it, and afterwards stands out all the processes of contempt,

2 P. Will.
556. Hawkins v.
Crook. See
vid. Lord
Hardwick's
observations
on and ob-
jections to
this case in
Davis v.
Davis, 2
Akt. 21.
Lady Aber-
gavenny v.
Lady Aber-
gavenny, 2.
Eq. cas. ab.
179. pl. 5.
1 Vern.
224.
1 Vern. 247.

tempt, the bill will be taken *pro confesso*, and though the sequestration be not sealed, or executed; but if the defendant has not appeared, Chan. Rep. 65. 10 Mod. 431. the court will not decree a bill to be taken *pro confesso*, but will order a sequestration against his real and personal estate, until he clears his contempt, for no decree can be had against him till he has appeared.

The defendant being a prisoner in the King's Bench refused to answer; whereupon it was prayed that the bill might be taken *pro confesso*, if he did not answer by a certain day; but the court was of opinion, that unless the defendant was in the prison of the court, the bill could not be taken *pro confesso*; whereupon he was removed by *habeas corpus* into the Fleet, and having a day given him to answer, and he still refusing, the bill was taken *pro confesso*, and he was ordered to be kept close prisoner. Chan. Rep. 50.

So where the defendant being a prisoner in York gaol, and the demand so trifling, it would not bear the expence of removing him by *habeas corpus* to the Fleet, it was moved, to save this expence, that for want of an appearance the bill might be taken *pro confesso*.

Lord Chancellor said, he could do nothing in this summary way, but the plaintiff must proceed in the usual method pointed out by the 5th of George II. c. 25. the act "for making process in courts of equity effectual against persons who abscond and cannot be served therewith, or who refuse to appear;" and though for some time, after making this act, there was a doubt whether it extended to bills of revivor, where defendants refused to appear to such bill, it is now settled that it does; and therefore the plaintiff must have recourse to the ordinary remedy, and the motion was denied. 3 Atk. 659.

Where the defendant is in custody upon process of contempt, (after appearance,) and being brought into court, and hearing the bill read to him, and he is required to answer, but obstinately refuses so to do; in this case the court *Mosely 384.* will order the bill to be taken *pro confesso*.

And if the defendant demur, and the demurrer be overruled, and the defendant ordered to answer, if he refuses, the bill may be taken *pro confesso*.

A quaker being in contempt for not answering upon oath; and he being by order brought to the bar, the Lord Chancellor admonished him of the peril of persevering; but he still refusing *2 Chan. Caf. 237.* to answer upon oath, the bill was taken *pro confesso*.

But it is presumed, if a quaker will now put in his answer upon affirmation, it is sufficient; but if he refuses, then the bill may be taken *pro confesso*.

Plaintiff brought her bill against defendant for an account of profits, &c. and after defendant had fully answered, plaintiff amended her bill three times, to which defendant put in three several pleas and demurrers, which had been all over-ruled, and the defendant stood in contempt to a sequestration for not answering the amended bill; the plaintiff now moved for liberty to set down the cause on the sequestration, in order that the bill might be taken *pro confesso*, when it was objected that there being an answer to part, (viz.) the original bill, the bill could not be taken *pro confesso*, because part was fully answered and denied, and the case of *Hawkins v. Crooke* was cited in support of this argument. *2 Well. 556. et antea pag. 274.*

On the part of the plaintiff it was urged, that if the defendant, by answering part, and refusing

to

to answer the most material point of all, should prevent the bill's being taken *pro confesso*, that would put the plaintiff in a much worse condition than not answering at all, and would encourage defendant by this method to elude the justice of the court; and as to *Hawkins and Crooke*, defendant in that case was willing and desirous to put in a full answer, and that liberty was at length given him by the court.

Lord Chancellor said, that this is an untrodden path, and as there are no precedents to direct, we must go upon the reason of the thing. At law, after the party has appeared and is in the court, if he makes default, judgement is given for the whole demand; and if in trespass, defendant pleads only to part, and says nothing to the residue; plaintiff may take his judgement immediately for what is not answered; and courts of equity form their process upon the same plan when the party is in court: and it is a jurisdiction which seems absolutely necessary, and exercised by all courts, that when they have the parties once before them, they should have it in their power to determine upon the right, and therefore seemed strongly to incline that the bill should be taken *pro confesso quoad*, the particulars not answered: but the defendant offering to answer by the next term, except as to matters of account, no order was made upon the main question.

4 Vin.
abridg. 446.
pl. 1. vid.
also *Davis v.*
Davis, 2
Atk. 24. in
which case
Lord Hard-
wick's rea-
soning and
opinion up-
on this sub-
ject will be
found at
large.

C H A P. I.

Of the various modes of defence to a Bill, and first of answers, under which head I shall treat separately—Of the time in which a Bill is to be answered—Of the manner in which an answer is taken and filed—Of the matter to be contained in it—Upon what occasion it may be amended—Of the mode of excepting to an answer for insufficiency—Of referring the same for scandal or impertinence—Of exceptions to the master's report of an answer being insufficient, scandalous, or impertinent—Of further answers.—And first, Of the time in which a Bill is to be answered.

A Defendant having appeared, and taken an office copy of the bill, his solicitor is to lay the same, or a copy thereof, before counsel, together with instructions for the answer, who will advise him, either to answer, plead or demur thereto, as the nature and circumstance of the case may require.

A defendant has in all cases, by the course of the court, eight days, exclusive of the day of appearance, to answer the plaintiff's bill; but if the defendant cannot within that time complete his answer, the court will, upon application, grant him three orders for time, and the length of time limited or allowed by these orders depends upon the residence of the defendant.

So if the defendant reside within ten miles, (which is called a town cause,) or within twenty miles of *London*; upon the first application for time, the court makes an order for one month; upon the second application a defendant may obtain

obtain another order peremptorily for three weeks; and a third order for a fortnight may be obtained upon the defendant undertaking or consenting by his counsel or clerk in court to pray no further time.

Regularly the first of these three orders ought to be obtained and served, before the eight days for answering are elapsed; and also each successive order for further time, ought to be served before the precedent order expires; but this is rarely or never attended to, the plaintiff's clerk in court usually giving the defendant an opportunity of getting an order for time; for although the time for answering has expired, without any answer, plea or demurrer being filed, by the courtesy of the office, the defendant's clerk in court expects to be called upon by the plaintiff's clerk in court for an answer, and also, to have notice of attachment, before any attachment is actually sealed, in order to give his client sufficient notice to procure an order for time.

It may and frequently does happen, that from the intricacy of the subject-matter of the bill, the peculiar circumstances of the defence which the defendant has to make, or from the operation of some other cause, the defendant is rendered unable to put in a full and complete answer within the time prescribed by the several orders abovementioned: therefore, in such or the like cases, the defendant is at liberty to make an application to the court, grounded upon the particular circumstances of his case, for further time to answer; and the court will grant such further time as is reasonable, upon condition that the defendant submits to enter his appearance with the register, as upon an at-

attachment returned, and consents that a serjeant shall go against him; and he must answer as well as clear his contempt, before he can be discharged: but this indulgence is only granted in cases where the defendant has not incurred the displeasure of the court, but has appeared regularly at the return of the *subpœna*.

A suit instituted against a defendant residing above twenty miles from *London*, is termed a country cause; and the defendant must answer in eight days, or pray a *dedimus* to take his answer, (to which he is entitled of course,) and in default of either, an attachment may be awarded; and a defendant in a country cause being entitled to a *dedimus* of course, he is seldom called upon to answer until the ensuing term, and then he generally applies for a *dedimus* to take his plea, answer, or demurrer, (not demurring alone,) which is called a special *dedimus*, and six weeks time to return the same, which is granted of course.

An ordinary *dedimus* by which an answer or plea can be taken, is made out by the clerk in court without any order, and is made returnable without delay; but regularly the *dedimus* (if the *subpœna* was returnable the first day of the term) ought to be returnable the last day of the term: though the modern practice is to indulge the defendant with a *dedimus* returnable the first return of the ensuing term. When the *subpœna* was returnable the last day of the term, the *dedimus* ought to be made returnable the first return of the next ensuing term: but the present practice is in all cases indiscriminately to indulge the defendant with a *dedimus* returnable without delay, or on a day certain in term.

In

In the short terms, and where the defendant lives a great distance from town, he must have a commission with a longer return, than when the defendant lives nearer town: and these proceedings are generally adapted to the convenience of both parties, and what time the defendant shall have, is usually settled amongst the clerks themselves.

By the rules of the court, a *dedimus* is returnable the first return of the next term, but by the practice is not returned till the second return of *Hilary* and *Trinity* terms, because the vacations between *Michaelmas* and *Hilary*, and between *Easter* and *Trinity* terms are so short; and this Mol. 176. practice was allowed by the Master of the Rolls.

After a contempt duly prosecuted to a proclamation returned, no *dedimus* is to issue without motion, and good cause to satisfy the court touching the delay.

To obtain an order for further time to answer in a town cause, instruction must be given to counsel, to move of course any day in term, or at the rolls, or on a seal day before or after the term, for the time to which the party is entitled; and when the motion is made, the counsel's brief is to be carried to the register's office, and the same to be left there with 4s. 6d. to draw up the order; and after it is passed, a copy of the order must be made, and entered at the same office, for which 1s. 6d. is to be paid: and the mode of serving this order is by delivering to, and leaving a copy thereof with the adverse clerk in court personally, or with his agent, at his seat in the Six Clerks office, and shewing him at the same time the original order, duly passed and entered, in order to ground an affidavit of the service, if necessary to be made.

An

Ord. vid. title
Petition.

An order for time may also be obtained, which is done by ingrossing and leaving a proper petition addressed to the Master of the Rolls at the secretary's office in the rolls yard, and paying 5s. 6d. when the same is taken away; the petition as answered, is to be left at the register's office to draw up the order, which is to be passed, entered and served as before.

Teth. 8. 10.

If a defendant does not answer in time, an attachment issues of course, but the same with the cause thereof must be entered with the register; as, that he appeared and departed without answer; that he did not answer by the day prefixed;—or that he did not return the *dedimus* at the day, or otherwise, as the case shall require.

3 Will. 90.

Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which court he will proceed, but need not however make such election, till the defendant has answered.

C H A P. II.

Of the manner in which an Answer is taken and filed.

Pract. Reg.
76.

THE answer being drawn or perused and signed by counsel, must be engrossed on parchment, on each skin of which there must be a half crown stamp; if the answer is taken in town, the same must be sworn to before one of the masters attending the public office; and if the defendant be within twenty miles of *London*, and unable from sickness to attend at the public office, a master ought, in strictness, to go to him and take his answer, for which an extraordinary fee of two guineas is paid: so a defendant in a country cause may, if he chuses, come

up

up to town, and put in his answer at the public office; but in general his answer is taken by commissioners in the country, a commission being first duly executed for that purpose.

Antiently the commission to take an answer, was granted upon a supposition of the defendant's inability to travel, by reason of sickness, age, or infirmity, and therefore the same was not granted, but upon oath of such inability or some other good cause; but when the business of the court increased, it became grantable of course; and so if a defendant lives twenty miles from London, he has, of course, a *dedimus po-testatem* to take his answer.

Pract. Reg.
76.
West. 33.

Ord. Chanc.
64.

The old rule of the court before the statute of 4 and 5 Anne c. 16. for amendment of the law, was to send to the commissioners the tenor of the bill annexed to the *dedimus*; and they examined the defendant, in taking his answer by this tenor, in the same manner as if they had been examining him upon interrogatories; and in the return of the commission certified the method in which they took his answer; so that there was no occasion either for the counsel, or the party, to sign the answer; but by degrees the inserting the tenor of the bill in the commission was done in so loose a manner in the office, that it became a mere *ballad*, and was of no real use to the parties, and did not at all answer the end of assisting the commissioners in framing the answer, but was a fruitless and unnecessary expence; so that the act of parliament for amendment of the law very judiciously took away the practice of sending with the commission *tenorem billæ*; and therefore, as this is now omitted, it is necessary the party as well as the commissioners should sign an answer taken in the country.

For the abuses which prevailed during the continuance of this practice;
Vid. Pract. Reg. 73. 74.

3 Atk. 440.

Lord Hardwicke taking notice, that answers and pleas taken by commission in the country, were frequently returned without being signed by the defendants, swearing such answers or pleas, by means whereof it became very difficult to frame an indictment against them, in case they should be guilty of perjury in their answer; made a rule for regulating the practice of the court in this respect, and ordered, that in future all answers and pleas, as well as those which shall be taken by commission as those which shall be taken before any master of this court, be signed by the parties swearing such answers or pleas, in the presence of the masters or of the commissioners, before whom the same shall be taken respectively.

Ordo. curiæ

April 27.

1748. 2

Aik. 290.

An answer in a town cause must be signed by counsel; where it is taken by commission in the country, there is no necessity for a counsel to sign it: in early times, when an answer was taken by *dedimus*, on the tenor of the bill; the commissioner being barristers at law, the signature of other counsel than the commissioners was dispensed with; and at present in a country cause, where the answer is taken by commission, although the answer is usually drawn or perused, and settled by counsel, his signature does not always appear upon the record.

In all cases the answer must be upon oath or affirmation, unless in the case of peers or peeresses of the realm, or bishops, who are to

Ord. Chanc.

40. 4.

Bac. Abridg. 237. Sir Thomas Mears exhibited a bill against the Lord Stourton, and it was ordered that his Lordship shall be examined upon interrogatories touching his title: and it was objected, that he being a peer of the realm ought to answer upon his honour only: and it was resolved by Harcourt Lord Keeper, that where a peer is to answer a bill, his answer put in upon his honour is sufficient; but where a peer is to answer interrogatories to make an affidavit, or to be examined as a witness, he must be upon his oath, 2 Salk. 512. 1. P. Will. 146.

answer upon protestation of honour only: but this ceremony is sometimes dispensed with, in favour of other persons than peers, as in the case of an amicable defendant, whose answer by consent of the plaintiff, under an order obtained of course for that purpose, may be taken without oath.

A *dedimus* to take an answer only, is termed an ordinary *dedimus*, and the same is made out of course, and an order is not necessary: but when a defendant is advised to demur and answer, or plead and demur, or to demur, plead and answer, a special commission for that purpose must be obtained, which cannot be made out by the clerk in court without an order, and the order is to be applied for by motion or petition, and when obtained must be served upon the adverse clerk in court; for a demurrer and an answer cannot regularly be taken under an ordinary *dedimus*, though a plea alone may by a special or ordinary *dedimus*.

But the court never grants a commission to demur alone, for the ancient rule was to plead, answer or demur, (not demurring alone,) because a demurrer is ever looked upon as dilatory, and the court will never indulge it by a commission in delay of the plaintiff, because the defendant may put in a demurrer alone without any oath, signed by counsel, and which he ought to put in in due time, and is not to be excused from it by a commission, to the needless charge and delay of the plaintiff; but by virtue of this commission, he may put in a plea, answer and demurrer, or a plea and answer, or a plea or answer only; and if after having obtained an order for such a commission, the defendant puts in a demurrer only, the same upon motion will

Steventon

v. Garden.

2 P. Will. 286. Sir John Dinely Goodere, v. De-n and Chapier of Worcester.
in the Exch. quer, Anno Domini, 1777. Lee v. Pascoe, 1 Brown's Chan. Rep 78.

will be discharged with costs, though in other respects the demurrer might be a proper one.

Pract. Reg.
77.

Two commissioners, one on each side, are sufficient to take an answer; yet generally there are two on each side, or two for the one party, and for the other, one only: and each party names his own commissioners.

And no second commission is to be had without special order of the court, on good cause shewn, or by consent.

As in commissions to examine witnesses, prove contempts, and other special commissions, directed by the court; so in a joint commission to take an answer, the commissioners agreed upon are to be entered in a book for that purpose, to be kept by the Six Clerk on the other side, that has the carriage of the commission, and subscribed into by each six clerk in the cause, or in their absence by their respective deputies; so that no alteration may be made of the commissioners names agreed upon, but by order; and the under clerk shall not agree upon names after any other manner.

Before either an ordinary or special *dedimus* is issued, the defendant's clerk in court usually calls upon the plaintiff's clerk in court, for commissioners names to see the defendant's answer taken, or leaves a note in writing with him for that purpose: the plaintiff's clerk in court thereupon leaves the names of two or more commissioners with the defendant's clerk in court; and the defendant's clerk in court naming two or more likewise, all of them are inserted in the *dedimus*; the plaintiff's clerk in court at the same time directs (as instructed by his client) to which of the plaintiff's com-

missioners

missioners the defendant is to give notice of executing the commission: the defendant's clerk in court then proceeds to make out the commission directed to his own and the plaintiff's commissioners: but if the plaintiff's clerk in court refuses to give such names, the defendant may, upon motion or petition, obtain an order to compel him to give in the names of his commissioners in two days, or in default thereof, that the defendant may be at liberty to have a commission directed to his own commissioners: the forms of which petition and commission are as follow:

“ Between A B, plaintiff,
C D, defendant.

“ To the Right Honourable the Master of the
Rolls.

“ The humble Petition of the Defendant,

“ Sheweth,

“ THAT the plaintiff hath exhibited his bill against your petitioner, to which he hath appeared, and your petitioner's clerk in court hath often called on the plaintiff's clerk in court for commissioners names to see your petitioner's answer taken, which he refuses to give to your petitioner's clerk in court.

“ That inasmuch as your petitioner lives in the county of E, about ——— miles distant from the court, and is not in contempt, nor has had any order for time to answer the said bill;

Your petitioner therefore humbly prays your Honour, that he may be at liberty to take out a commission for taking his answer to the said plaintiff's bill, returnable ——— And that the plaintiff's clerk in court may, in two days after notice hereof, give to your petitioner's

The Practice of the

tioner's clerk in court commissioners names for taking your petitioner's said answer; or, in default thereof, that your petitioner may take out such commission directed to his own commissioner; and that all process of contempt against your petitioner for want of his answer may be stayed in the mean time.

"And your petitioner shall ever pray," &c.

An ordinary Dedimus to take an Answer.

"George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To E F, G H, J K, and L M, Gent. greeting. Whereas A B, Gent. complainant hath lately exhibited his bill of complaint before us in our court Chancery against C D, Gent. defendant: And whereas we have by our writ lately commanded the said defendant to appear before us in our said Chancery at a certain day now past to answer the said bill: Know ye, that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendant to the said bill; and therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendant, if he cannot conveniently come to you, and take his answer to the said bill *on his corporal oath, upon the Holy Evangelists, to be administered by you, any three or two of you*, the said answer being distinctly and plainly written upon parchment: And when you shall have so taken it, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery

where-

wheresoever it shall then be, together with this writ. Witness ourself at *Westminster* the ——— day of ——— in the ——— year of our reign.

Here put the Master of
the Rolls and Six
Clerk's surnames. }

Indorse it, "*By the court.*"

Label: "To (the commissioners)
any two or three of them, a commission to take the answer of C D defendant, at the suit of A B complainant, returnable (insert the return) on six days notice to the said (plaintiff's commissioner to whom the notice is to be given.)

ARDEN, HANMER."

Note, If the *dedimus* issue *ex parte*, the notice on the label is to be omitted.

If the defendant is a peer of the realm, the words in *italics* in the body of the commission are to be omitted, and the words "*upon his honour*," to be inserted in their stead; if the defendant be a Jew, the words "*upon the sacred Pentateuch, or five Books of Moses*," are to be inserted.

An ordinary Commission to take a Quaker's Answer.

"George the Third, &c. To (the commissioners) greeting. Whereas A B complainant hath lately exhibited his bill of complaint before us in our court of Chancery against C D; and whereas we have by our writ commanded the said defendant to appear before us in our said Chancery, at a certain day now past, to answer the said bill; but forasmuch

The Practice of the

asmuch as the said C D is one of the dissenters called Quakers, as is alledged; know ye therefore, that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendant to the said bill upon his solemn declaration and affirmation, to be made before you, any three or two of you, according to the form and tenor of the statute in that case made and provided*: Therefore we command you, any three or two of you, that at such certain day, and place, as you shall think fit, you go to the said defendant, if he cannot conveniently come to you, and take his answer to the said bill as aforesaid, the said answer being distinctly and plainly wrote upon parchment: And when you have so taken it, you are to send the same closed up under the seal of you, any three or two of you, unto us in our said Chancery where-soever it shall then be, together with this writ. Witness, &c." (*The same conclusion as in the former precedent.*)

A Commission to take the Answer of a Corporation.

"George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To greeting. Whereas A B complainant, hath lately exhibited his bill of complaint before us in our court of Chancery against C D, E F, &c. defendants; and whereas we have by our

* If there be another defendant not a Quaker, insert, "And the answer of the other defendant to the said bill, on his corporal oath upon the holy Evangelists, to be administered by you, any three or two of you."

writ

writ commanded the said defendants to appear before us in our said Chancery at a certain day now past, to answer the said bill; but soasmuch as the said C D, E F, &c. are a body corporate, and ought and have been accustomed to put in their answer by a general consent; Know ye, that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendants to the said bill, under the common seal of the said corporation: And therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendants, if they cannot conveniently come to you, and take their answer to the said bill under their common seal; the said answer being distinctly and plainly wrote upon parchment: And when you shall have so taken it, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery ——— wheresoever it shall then be, together with this writ. Witness, &c.

A Commission to take the Answer of a Corporation, and the Answer of other Defendants.

George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To ——— greeting. Whereas A B complainant hath lately exhibited his bill of complaint before us in our court of Chancery against C D, E F, &c. defendants; and whereas we have by our writ commanded the said defendants to appear before

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fore us in our said Chancery at a certain day now past, to answer the said bill; but forasmuch as the said C D, &c. are a body corporate, and ought and have been accustomed to put in their answer by a general consent; know ye, that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendants, the corporation, to the said bill under the common seal of the said corporation, and the answer of the said other defendants on their corporal oath upon the holy Evangelists, to be administered by you, any three or two of you: And therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendants, if they cannot conveniently come to you, and take the answer of the said defendants the corporation to the said bill under their common seal, and the answer of the said other defendants on their oath as aforesaid; the said answers being distinctly and plainly wrote upon parchment: And when you shall have so taken them, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery ——— where-soever it shall then be, together with this writ. Witness, &c.

The Form of a special Dedimus to plead, answer, or demur.*

“George the Third, &c. To — (here insert commissioners names) greeting. Whereas A B

* The form of a commission to take the answer of an infant, and also the necessary formality to be observed preparatory to the appointment of a guardian, will be taken notice of under title Infant, for which vide Index.

complainant

complainant hath lately exhibited his bill of complaint before us, in our court of Chancery, against C D defendant; and whereas we have by our writ lately commanded the said defendant to appear before us in our said Chancery, at a certain day now past, to answer the said bill; know ye, that we have given unto you, any three or two of you, full power and authority, in pursuance of the special order of our said court, to take the answer of the said defendant to the said bill on his corporal oath upon the holy Evangelists, or his plea upon his corporal oath to be administred by you, any three or two of you, or his plea, or demurrer, without oath, to be respectively made to the said bill: And therefore we command you, any three or two of you, that at such day and place as you think fit, you go to the said defendant, if he cannot conveniently come to you, and take his answer, plea, or demurrer, respectively as aforesaid, to the said bill, the same being distinctly and plainly written upon parchment; and when you shall have so done, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery ——— wheresoever it shall then be, together with this writ. Witness ourself at *Westminster* the ——— day of ——— in the ——— year of our reign."

ARDEN, HANMER."

Indorsed, "*By order of court.*"

Label: "To ——— (*here insert names of commissioners*) a special *dedimus* to take the plea, answer, or demurrer of C D defendant, at the suit of A B complainant, returnable ——— on

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six days notice to ——— (*here insert plaintiff's commissioners to whom notice is to be given*)."

To each of these writs the Master of the Rolls and Six Clerk's surnames are subscribed, and also upon the label, and generally the clerk in court's name, in order to point out the clerk to whom it belongs.

The commission is given by the defendant's clerk in court to the bag-bearer of the office, to be sealed, who afterwards leaves it at the clerk's seat in the Six Clerks office, for which 6d. is paid at a common seal, and 3s. 6d. *extra* at a private seal. The commission, being thus compleated, is to be sent to the defendant's solicitor, or agent in the country, to be executed; and six days notice of the time and place executing the commission must be given to the plaintiff's commissioner; which notice may be in the following form:

"We whose names are hereunto subscribed, having received a commission issuing out of the high court of Chancery, to us and others directed to take the answer of C D defendant, to the bill of complaint of A B complainant: we do hereby give you notice, that we intend to execute the said commission on the ——— day of ——— instant, between the hours of twelve and one in the afternoon, at the house of ——— situate in ——— in the county of ———; at which time and place you may be present, if you please, to see the same taken.

Given under our hands the ——— day of ——— 1790.

"To Mr ——— plaintiff's commissioner.

E F.
G H."

Note,

Note, If the commission issue *ex parte*, no notice is given.

The commissioners, together with the defendant and his solicitor, having met on the day appointed, the answer is produced, ingrossed upon parchment, and ready prepared for swearing; then the commission is opened by one of the defendant's commissioners; that being done, he interrogates the defendant thus: "Have you heard this your answer read, and do you exhibit it as your answer to the bill of complaint of ———?" To which the defendant answering in the affirmative, one of the commissioners administers this oath to the defendant, laying his right hand on the Bible or New Testament:

"You shall swear, that what is contained in this your answer, as far as concerns your own act and deed, is true of your own knowledge; and that what relates to the act and deed of any other person or persons, you believe to be true. So help you God."

The same oath is administered when an answer is sworn in town at the public office.

The defendant signs his answer in the presence of the commissioners.

The answer, being taken, it is to be annexed to the commission; and the commissioners write the caption at the foot of the answer, thus:

"This (plea and) answer was taken, and the abovementioned C D the defendant was duly sworn to the truth thereof on the holy Evangelists (and the demurrer of the said defendant was taken without oath), at the house of E F, situate in the parish of ——— in the county of ——— on the ——— day of ——— in the 30th year of the reign of his majesty King George the

The Practice of the

Third, and in the year of our Lord 1790, by virtue of the commission hereunto annexed, before us ———."

To this the commissioners sign their names.

The Caption of a Peer's Answer:

"This answer was taken upon the attestation of honour of the above-named defendant, the Duke of ——— at," &c.

The Caption of a Quaker's Answer:

"This answer was taken upon the solemn affirmation of the said," &c.

The Caption of the Answer of a spiritual Corporation:

"This answer of the above-named defendants, the Dean and Chapter, of the cathedral church of Gloucester, was taken under the common seal of the said Dean and Chapter, as by the said seal affixed appears, at," &c.

The Caption of the Answer of a Corporation temporal:

"This answer of the above-named defendants, the Mayor, Aldermen, and Common Council of the city of Chester, was taken under the common seal of the said corporation, as by the said seal affixed appears, at," &c.

The caption of the defendants answer is to be properly varied according to the nature of the thing to be sworn to; and being subscribed by two of the commissioners, the commission is indorsed about the middle thus:

"The execution of this commission appears in a certain schedule, or certain schedules (if more than one skin), hereunto annexed;" and underneath the indorsement, the commissioners are to sign their names.

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The commissioners should be careful to observe great exactness and care in the caption of the answer: the joint and several answers of the defendants was on motion suppressed for irregularity, because it was underwritten *jurat*, and not *jurati*, or *ambo jurati*: and the Master of the Rolls said, he had known such an answer adjudged irregular.

If there be schedules, they are all to be annexed to the commission, and then the commission is to be made up and sealed, and directed to the clerk in court of the defendant: and when the same is sent up by any person not a commissioner, the defendant's clerk in court takes him to the public office to be sworn before one of the masters; where he swears, "*That he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened nor altered since he received it.*"

And the indorsement then is:

"3d February 1790. Upon the oath of A B (the bearer of the commission) at the public office before ——."

But if the messenger or bearer be sworn at any other place, the indorsement must be properly varied.

But if one of the commissioners has the carriage thereof, and delivers it sealed, as aforesaid, into the hands of the clerk in court, it is always accepted without oath, and indorsed thus:

"3d February 1790. Received by the hands of —— one of the commissioners ——."

These necessary formalities being duly observed, the answer may be opened; and the clerk

clerk in court enters it in his cause-book, annexes it to the bill, marks it at the top, with the day and year when filed, and subscribes his name at the bottom on the left side; and then files it with his six clerk, of which he informs the plaintiff's clerk in court, who goes into his six clerk's study (the answer being by the defendant's six clerk transmitted thither) and takes it from thence, first making an entry thereof in the six clerk's book: but if the answer of another defendant to the same bill be filed before, he then proceeds as aforesaid, save that, in this case, he does not annex the answer the bill, but only writes at the bottom of the answer, "*Bill with another answer to A, i. e. the plaintiff's six clerk, filed such a term with B, i. e. the defendant's six clerk.*"

Note, Though no answer is strictly reputed such till filed, nor to be filed until the costs of contempt for not answering are paid, yet they are frequently filed before.

If the answer be taken without oath, which may be, and is in every day's practice done by consent upon motion or petition, and plaintiff's consent thereto, the order made thereon must be drawn up, passed, and entered, and left with the defendant's clerk in court, without which order the answer cannot be filed; but when the same is obtained, and the clerk in court files the answer, he writes at the top thus: "*Without oath, by order dated the — day of — 1790.*"

There must be six days notice (exclusive of the day of executing the commission) given to the plaintiff, or some other person named (for that purpose) in the label of the *dedimus*; and if notice be given upon *Sunday*, it may perhaps be

be sufficient notice to justify an execution of the commission on the *Saturday* next following.

Pract. Reg.
77.

No second commission is to be granted, without special order of the court upon good reason to induce the same, or upon the plaintiff's own agent.

Ord. Chan.
121.

If the party who has the carriage of the commission, neglect to execute it, the court will grant a new one to the adverse party, and give him the carriage of it.

Pract. Reg.
78.

An attachment and other process of contempt, which issued for not returning the commission and defendant's answer was discharged, paying the ordinary fees; because one of the plaintiff's commissioners refused to join with one of the defendant's to take the answer: and a new commission was granted to indifferent commissioners named by the defendant.

Cary's Rep.
118.

If by the fault of him who has the carriage of the first commission, the other is put to unnecessary trouble, the court will order a master to tax him his costs, and upon cause shewn, order the party in fault to give security to pay the same before he obtains a second commission, and, if he has the carriage of the second commission, to pay the costs upon that also, if he again fails.

Pract. Reg.
78.

If the party who has the carriage of the commission gives notice of executing it, but does neither countermand notice in due time, (as three or four days before the time, or as the distance of the place or other circumstances may require,) nor execute it at the time, the court on motion, and affidavit of facts, will order costs to be taxed for the adverse party's attendance.

Ibid.

Notice being given of executing a commission, the plaintiff's commissioners attended at the

the

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the place and day from nine till twelve, and from one till three, and the defendant's commissioners came not; but the answer was sworn the next day: the plaintiff therefore moved, that the answer might be suppressed; but the court said, his commissioners should have staid till six o'clock.

Ibid. 78.

Upon a motion to suppress an answer, because one of the commissioners who took it was an attorney's clerk under age; the court said, If he be old enough to take an oath, he is old enough to be a commissioner to take an answer.

Ibid. 81.

If by misfortune the *dedimus* be lost, the court will grant a new one.

Ibid.

If a defendant, having a commission to answer only, tenders a demurrer to the commissioners, and refuses to answer upon oath, they are to return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the court.

3 P. Allen,
56.

In case of a foreigner not sufficiently versed in the *English* tongue, an order of course must be obtained, upon motion or petition, for an interpreter; and an answer being engrossed in the language of the defendant, a translation thereof upon parchment must be made by the interpreter and annexed: the foreigner must be sworn to his answer; the interpreter attending is previously sworn to interpret truly, and conveys to the foreigner the language of the oath; at the same time, he swears to the translation as true and just, to the best of his ability.

Hind's Prac.
in Ch. 228.
Vid. also
Barnard,
223.

The separate answers of
feme covert, with the reasons which make the same necessary, will be considered in another place; for which vide Index, under title Feme Covert.

Where corporations are sued here in their political capacity, they answer under the seal

of the corporation; but if all those of which the corporation consists, be charged as private persons, they must answer upon oath. Pract. Reg. 114.

Doubted whether a sole body politic must answer on oath or not. Toth. 7. 13.

So when a bill was filed against a corporation to discover writings, the defendants answer under their common seal; and so being not sworn, will answer nothing in their own prejudice: ordered, that the clerk of company, and such principal members as the plaintiff shall think fit, answer upon oath, and that a master settle the oath. 1 Vern. 117. Anon.

C H A P. III.

Of the Matter to be contained in the Answer.

IF the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if, from the accuracy with which the bill is framed, or the peculiar nature of the subject matter of it, neither a plea nor demurrer will hold, in all or either of these cases, the proper mode of defence is by answer; or if the defendant can offer a matter of plea which would be a complete bar; but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill; as if the defendant insists upon the

statute

the place and day from nine till twelve, and from one till three, and the defendant's commissioners came not; but the answer was sworn the next day: the plaintiff therefore moved, that the answer might be suppressed; but the court said, his commissioners should have staid till six o'clock.

Ibid. 78.

Upon a motion to suppress an answer, because one of the commissioners who took it was an attorney's clerk under age; the court said, If he be old enough to take an oath, he is old enough to be a commissioner to take an answer.

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If by misfortune the *dedimus* be lost, the court will grant a new one.

Ibid.

If a defendant, having a commission to answer only, tenders a demurrer to the commissioners, and refuses to answer upon oath, they are to return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the court.

3 P. Alen,
56.

In case of a foreigner not sufficiently versed in the *English* tongue, an order of course must be obtained, upon motion or petition, for an interpreter; and an answer being engrossed in the language of the defendant, a translation thereof upon parchment must be made by the interpreter and annexed: the foreigner must be sworn to his answer; the interpreter attending is previously sworn to interpret truly, and conveys to the foreigner the language of the oath; at the same time, he swears to the translation as true and just, to the best of his ability.

Hind's Prac.
in Ch. 228.
Vid. also
Barnard,
223.

The separate answers of feme covert, with the reasons which make the same necessary, will be considered in another place; for which vide Index, under title Feme Covert.

Where corporations are sued here in their political capacity, they answer under the seal
O

of the corporation ; but if all those of which the corporation consists, be charged as private persons, they must answer upon oath. Pract. Reg. 114.

Doubted whether a sole body politic must answer on oath or not. Toth. 7. 13.

So when a bill was filed against a corporation to discover writings, the defendants answer under their common seal ; and so being not sworn, will answer nothing in their own prejudice : ordered, that the clerk of company, and such principal members as the plaintiff shall think fit, answer upon oath, and that a master settle the oath. 1 Vern. 117. Anon.

C H A P. III.

Of the Matter to be contained in the Answer.

IF the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if, from the accuracy with which the bill is framed, or the peculiar nature of the subject matter of it, neither a plea nor demurrer will hold, in all or either of these cases, the proper mode of defence is by answer ; or if the defendant can offer a matter of plea which would be a complete bar ; but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill ; as if the defendant insists upon the statute

2 P. Will.
145. Nor-
ton v. Tar-
vill.

statute of limitations by way of answer, he shall, at the hearing, have the like benefit of the statute as if he had pleaded it.

Treatise up-
on Pleadings
by English
Bill, 246.
247. Vide
also Rules
and Orders
in Chan.
99, 100.
ed. 1739.
2 Eq. Caf.
Abr. 67.
S-l. Caf. in
Chan. 53.

To so much of the bill as is necessary and material for the defendant to answer, he must speak directly and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge; and wherever there are particular precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

An answer must contain nothing scandalous or impertinent; and to a matter charged as the defendant's own fact, it must regularly be without saying, "To his *remembrance* or *belief*," if laid to be done within six years before, unless the court, upon exceptions taken, shall find special cause to dispense with it: and as to the fact of another, which the defendant cannot speak to with certainty, he ought to say, "*He has heard and conceives, or believes it to be true*;" or that "he does not believe or *conceive it to be true*;" and he ought not to say simply, "*that he has heard*."

If the defendant deny a fact charged in the bill, he is to traverse or deny it (as the case requires) directly, and not by way of *negative pregnant*; as if he be charged with the receipt of a sum of money, he must deny or traverse that he hath not received that sum, or any part thereof; or else set forth what part he hath received, and deny the rest; thus where a bill required a general account, and at the same time called upon the defendant to set forth whether he had received particular sums of

of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what account, such sums had been received; it was determined, that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient; and the plaintiff having excepted to the answer upon this ground, the exception was allowed; the court being of opinion, that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally that he had in the schedule set forth an account of all sums received by him.

Treatise upon Pleadings by English Bill, 247. Hepburn v. Durand, 20th Nov. 1779, in Chan.

So if the fact be laid to be done with divers circumstances, he must not traverse or deny it literally as laid in the bill, but must answer the point of substance positively, and with certainty; but the defendant is not obliged to answer to any matter, the confession whereof might subject him to any penalty or forfeiture at law; so a counsellor, a clerk in court, or solicitor, are not compellable to answer what they know of their client's causes, so long as they act in such respective capacities; neither is a referee compellable to answer to that which is agreed between the parties upon the reference should not be disclosed, or made use of on either side.

Vide Clarendon's Orders, 18 Car. 2.

1 Chan. Cas. 277.

Ibid.

An answer ought not ordinarily to set forth deeds *in hac verba*; and though the bill prays they may be set forth, yet, if the defendant saith in his answer, he is ready to let the plaintiff have copies of them; or if he does not say so, but sets forth only so much thereof as is material to be known to the plaintiff, it is sufficient;

and

Ord. Chanc.
321.

Newman v.
Godfrey and
others,
2 Brown's
Chan. Rep.
332.

and the court will order, that the plaintiff have liberty, at his own charge, to take copies of them, without sending them to a master; or order the defendant to produce them, on the examination of witnesses.

So where a defendant answered all the circumstances respecting his own interest, he shall not be compelled to answer the further circumstances in the bill, ruled upon exceptions.

In an answer to a bill to redeem, the mortgagee ought to say, he is willing to receive his money as the court shall direct; for then the court will not order him to receive it without a reasonable notice; but if he says generally he is ready to receive his money, the court will order it to be paid immediately; so if the defendant in an answer to a bill to be relieved against the penalty of a bond, says, he does not insist upon the penalty, but is ready to receive his interest, principal and costs, the parties shall be forthwith sent to a master to examine what is due; so also if, in an answer to a bill to be relieved against an action upon the case at law, the defendant swears the money to be due, the court will sometimes order a judgment to be given in debt, with a release of errors, or the injunction to be dissolved.

Pract. Reg.
14.

In an answer, a purchaser for a valuable consideration need set forth no deeds or writings, but those by and under which he more immediately claims: nor is it necessary that a purchaser without notice, should in his answer or plea set out the conveyance at large, or the sums or dates, but only in general say, by good and sufficient conveyances in law, for a real and valuable consideration in money paid: and a purchaser may charge and discharge him-
self

Ibid.

self by his answer; and said, that he is not bound by an improvident offer in his answer.

Fq. Caf.
Abr. 36.
p. 3.
Watkins
and Hatchet.

Where the general traverse is omitted at the end of the answer, such answer is good, and not to be suppressed as improper, the bill being fully answered.

2 Will. Rep.
145.

Where the husband will answer to the prejudice of the wife, who is an executrix, the court (on motion) will give leave for her to answer separately.

2 V. l. Eq.
Abr. 66.

If a bill be brought against three for a joint demand, and one of them by his answer says, he believes and hopes to prove the debt paid; and the cause is heard upon bill and answer, as to him the plaintiff can have no decree; for though the defendant does not directly swear that the money is paid, yet his answer must be taken to be true, because the plaintiff, by not replying to him, has precluded him the benefit of his proof; but upon payment of costs, he may reply to the other defendants. No decree can be made against a man's answer, upon the proof of one witness: but an answer in a court of equity is evidence at law against the defendant.

Binken and
Will,
1 Vern. 140.
Earl of
Montague
v. Bates,
3 Chan. Caf.
123.
1 Vent. 212.

A defendant upon his oath shall be discharged of sums under 40s.

2 Chan. Caf.
209.
Masely 253.
S. P.

Although the defendant, by his answer, denies the title of the plaintiff, yet in many cases, he must make the discovery prayed by the bill, though not material to the plaintiff's title; and though the plaintiff, if he has no title, can have no benefit from the discovery; as if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes; though

Vid. how-
ever, Gilb.
229.

Treatise up-
on Pleadings
by English
Bill, 248.
Vid. also

Hard. 230.
188. Mose-
ly 45. 70.

the defendant insists upon a modus, or upon an exemption from the payment of tithes, or absolutely denies the plaintiff's title, he must yet answer to the quantity of land, and the value of the tithes: or if a bill is filed against an executor by a creditor of the testator, the executor must either admit assets, or set forth an account, though he denies the debt.

On a bill to establish an agreement for separate maintenance, the husband is not obliged to discover acts of hard usage to his wife: so defendant is not bound to answer what tends to accuse him of maintenance, or of buying pretended rights within the statute of 32 Hen.

3 Will. 375 8.

Note, a person interested in the premises as a mortgagee (though no party to the suit) may expend money in the suit without being guilty of maintenance.

In general, no defendant by his answer can affect the rights of other parties; but where one defendant has answered, and the others refused, there are instances wherein the court hath determined that the rest shall be bound by the answer of the other.

A defendant is not bound by an admission of a consequence in law, or a consequence in equity (though he may be bound by an admission of a fact) for the court is to judge of the law.

Ibid. 523.

So in the case of a special verdict at law, if the jury make a wrong conclusion, the court is not bound, but will judge by the fact; as to a writ of error, where error in law is assigned, and the defendant comes in and admits the error, yet the court is not bound by the admission, but will determine according to their own judgment whether it is error in law.

If fraud be charged in a bill, it must be denied by answer, and not by way of plea.

1 Vern. 181.

Where there is a joint and several answer by A and B, if A for himself answers, and B says, that he has perused the answer of A, and believes

lieves it to be true, if B be charged with nothing of his own knowledge, such a relative answer is sufficient; but it is otherwise where the defendants answer severally.

It is a rule in equity, that the answer overrules the plea, where the defendant answers to the same thing he insists upon by his plea, for he ought not to aver it.

Hard. 105.

4 Vin. Abr.
442. pl. 1.

C H A P. IV.

Upon what Occasion an Answer may be amended.

THERE are no certain rules for amending answers, but in this the court exercises a discretion; for the amendments in an answer are not confined merely to mistakes in the in- grossment of the answer, where that has differed from the original draught; there are instances of permitting answers to be amended as to mistakes in matters of fact; and sometimes it has been amended after issue joined.

Barnard, 51.
Woodgate
and Fuller.
1 Chan. Caf.
29. Bunb.
248. pl. 321.
Toth. 13.
3 Px. Alone
37.

The defendant may, without notice, move to amend his answer in a small matter; but if it be in a material point, he must give notice, and the court sometimes grants it, upon an affidavit that the defendant was surprized therein, and payment of costs.

1 Chan. Caf.
29.

Motion for leave to amend an answer in three particulars, wherein defendant found plaintiff mistaken: and *per curiam*; we often do it where issue is not joined, and it was ordered accordingly: but an answer was not allowed to be amended barely upon the affidavit of the defendant.

Bunb. 186.
pl. 263.

Barnard 57.

A bill was brought by the next of kin of a testator against an executor for an account of the surplus, the executor answered and waived

the benefit of the surplus by mistake of the law in that point; and though he afterwards proved it to be the testator's intent that he should have the surplus, yet it was denied him to

¹ Will. 297. amend his answer.

So upon a motion to amend an answer by striking out the offer of the defendant's bringing in his share into hotch-pot upon a mis-computation of the father's estate; the Lord Chancellor said, whatever may be the right of the parties, it is impossible to suffer the defendant to amend his answer in the manner he desires; for it would be of dangerous consequence. It is true, at law they will allow you to amend, but it is in matters of form only; here it is an extreme different thing, for it is an admission of facts, as, that 1300l. advanced by the defendant's father in his life-time was a full advancement. And though, if the certainty of the sum appears, a child is not precluded from the residue of the orphanage share, yet, he may be bound by any agreement between him and his father, that this money so advanced should be in full, and bar him of the residue of his orphanage share. It would be strange, therefore, to strike out this admission, and deprive the plaintiff of the benefit of this evidence, when the defendant does not swear that he is surprized into this admission, or ill advised in setting it forth; and his Lordship denied the motion.

³ Ark 523.
The case of
Rawlin v.
Powell in
¹ P. Will.
297. is a
much
stronger case
than this to

Under particular circumstances, a defendant was permitted to amend her answer by adding a new fact; and this was the case of the Duke of Devonshire v. The Duke of Devonshire, where it was shewn the reluctance with which the court permits an answer to be amended; for in that case there was strong proof that the testator intended the surplus to the executor, and directed the scrivener in his will to make a bequest thereof to him; but that the scrivener said, this was unnecessary, for that the executor would take the surplus of course; yet the executor was not permitted to amend his answer.

chefs of *Wharton*, who in her answer referred to marriage articles which were executed in *Spain*, and consequently made it incumbent upon her to produce them: it seems the custom in *Spain* is to deposit articles and other deeds in places appointed for that purpose; so that an authentic copy is all that can be had in this case; and therefore the court was of opinion, that the Duchess ought to have liberty to amend her answer, so far as to set forth the custom in *Spain*, with regard to the depositing of deeds.

2 Atk. 295.

An answer was amended after hearing and decree; but this was permitted upon very full affidavits of the solicitor and his clerk, that this was only a mistake in the person that ingrossed the answer from the draught, and the foul draught produced.

2 P. Will. 327.

No certain rules are laid down for the amendment of answers; but the most common case in which amendments are permitted, is, when through inadvertency a defendant has mistaken a fact or date; there the court will permit an answer to be amended, to prevent a defendant from being prosecuted for perjury.

2 Atk. 295.

When upon hearing a cause, it has appeared that the defendant has not put in issue by his answer facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, the defendant will be permitted to amend his answer: and this has been particularly done in the Exchequer, where a *modus* had been set up as a defence to a bill for tithes; in which case, if it appears from the evidence in the cause that there was probably a good ground for opposing the plaintiff's claim, though the defendant had mistaken it, the court has permitted

Treatise
upon Suits
by English
Bill, 261.
Phillips v.
Gwyne,
Exchequer,
Easter 1779,
cited; but
in later cases
the court
has refused
this indul-
gence.

Ibid.

mitted him to amend his answer: but when a fact which may be of advantage to a defendant has happened subsequent to his answer, it cannot with propriety be put in issue by amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill, in which the fact can be put in issue, be brought to a hearing with the original suit; and a bill for this purpose seems to be in the nature of a plea *puis darrein continuance* at the common law.

C H A P. V.

Of the Mode of excepting to an Answer for Insufficiency.

IF the answer be good to common intent, the plaintiff must reply, and prove the matter of the bill to be true, if he can, and not insist upon the insufficiency of the answer: this seems to be intended as to things publicly done, and not resting in the defendant's knowledge only; for the defendant ought to answer secret transactions with certainty: but if a plaintiff conceives an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill.

Exceptions then are the allegations of a party in writing, alledging that some pleading or proceeding in a cause is insufficient, or not perfectly answered in a certain point or points particularly expressed and set forth in such exceptions; for the court will not refer an answer to be examined upon the surmise of general insufficiency only.

And

And exceptions are drawn, or at least perused and signed by counsel; and care is to be taken in drawing them, for no new exception is to be added: and the practice in filing exceptions touching the insufficiency of an answer, is, to deliver them to the defendant's clerk in court, so signed on unstamped paper, or his clerk or agent, at his seat, first marking them at the top with the day of the month and year when delivered; and this is called filing exceptions; and exceptions are of two kinds, viz. to an answer, or to a master's report.

A plaintiff cannot refer exceptions to a first answer until eight days after they are filed, but upon a second insufficient answer, they may be referred immediately after the plaintiff has filed his exceptions; and the defendant is usually called upon by the plaintiff's clerk in court, to answer after the eight days are expired; and if he submits to put in a further answer, the plaintiff's clerk in court generally calls for the answer, and gives notice of attachment, if it be not forthcoming; but before the further answer is filed, the defendant must pay to the plaintiff 20s. costs for the insufficiency of his answer; and a defendant residing in *London*, or within ten miles of it, (which is a town cause,) is intitled to an order for a month's time to answer the exceptions; and if he reside above twenty miles from *London*, he may obtain, by order or petition, an order of course for a *dedimus* to take his answer to the exceptions, and six weeks time to return it; sometimes the defendant is indulged with further time, which is discretionary in the court to grant, and is always adapted to the particular circumstances of his case shewn to the court.

But if the defendant, upon advising with his counsel, conceives his answer to be good and sufficient, then he puts the plaintiff to obtain an order (which is of course) to have the exceptions referred to the master, to look into the bill, answer, and exceptions, and to certify whether the defendant's answer be sufficient in the points excepted to or not.

Gillb. Chan.
99.

This order being drawn up, passed, and entered at the register's office, must be served upon the defendant's clerk in court; and, upon producing the order of the reference at the office of the master to whom the reference is made, and leaving there a fair copy of the exceptions, the master will grant a warrant to be served upon the defendant's clerk in court to attend the reference of the exceptions; a copy of this warrant must be served personally on the defendant's clerk in court, or upon his clerk or agent at his seat in the six clerk's office, at the same time producing the original; for the bare leaving it at the seat, when nobody is there, or at the house of the clerk in court, is in strictness no good service of the warrant, though that mode of service is often practised; the warrant must also be served two days before the exceptions are argued, that is to say, if the warrant is taken out on *Monday*, it must be made returnable the *Wednesday* following, so that one day intervenes between the day of service and day of attendance, and *Sunday* is not reckoned for this purpose as one. If the defendant's solicitor will not attend to maintain the sufficiency of the answer after three warrants are served upon him, and after attendances are observed by the plaintiff's solicitor at the times and places appointed by the warrants, the master will proceed to make
his

his report of the insufficiency of the answer, according to the exceptions then before him; the person who served the warrant previously making oath of the service of them upon the defendant's clerk in court: this proceeding is termed an *ex parte* proceeding; and the report thus made states, that the master hath been attended by the plaintiff's clerk in court or solicitor (as the fact is), none attending for the defendant, though duly summoned (as by oath made before him appears), &c.

But if the defendant's solicitor intends to insist upon the sufficiency of the answer, he must bespeak a copy of the exceptions left at the master's office, or his attendance will not be allowed; and when the solicitors on each side attend at the time and place appointed by the warrant, the order of reference is produced, and the master, pursuant to the order, looks into the office copies of bill and answer, and the exceptions, the solicitors suggesting to him their reasons why the answer is or is not sufficient; but most commonly counsel are retained to argue the exceptions before the master, and generally those who signed the bill and answered respectively.

The master then gives his opinion upon the exceptions as to the sufficiency or insufficiency of the answer, and certifies the same in a report to the court: the report, when signed by the master, is taken away by the party in whose favour the report is made (paying 15s.) and carried to the report office to be filed; 4d. is paid for filing; and if an office copy is necessary to be taken, 1s. 6d. is paid for the first side, and 1s. for every other side: and if the report is, that the answer is insufficient, then the defendant is to pay (if a town cause) 40s. for his answer

Gilb. Chan.
101.

answer being insufficient; and if in a country cause, where the answer is returned by commission, 50s.

For the recovery of these costs, and to compel the defendant to put in a further answer, the plaintiff sues out a *subpœna* for the costs, and serves the defendant personally therewith, and demands the costs of him, and if he refuses payment thereof, upon an affidavit of the service of the *subpœna* and demanding the costs (which are always made payable by the *subpœna* to the plaintiff or bearer thereof, and the bearer, whoever he is, may give a receipt for the costs), there issues out an attachment against the party for non-payment of the costs; and such proceedings are had for recovery thereof, by carrying on the proceedings of the court against the party contemning as is usual in those cases, (viz.) by proclamation, and so on to a sequestration; but this rarely or ever happens in the case of 40s. or 50s. costs, which are generally paid on the service of the *subpœna*.

And to oblige the defendant to put in a further answer to the bill, (where his answer is reported insufficient,) the plaintiff is not bound to serve him with a new *subpœna*; but he is to serve his clerk in court with a *subpœna* to put in a better answer, which is always allowed to be good service; and to procure this writ, a *præcipe*, in the following form, must be left at the *subpœna* office, and 5s. if one or two defendants, and 6d. for the additional label where there are three defendants.

“*Subpœna, James Thomson, to appear in Chancery, to make a better answer, at the suit of John Drake complainant, returnable immediate.*”

“*Tested, 3d February 1790.*”

Price solicitor.”

The writ is in the following form.

“George the Third, by the grace of God, &c.
to *James Thompson*, greeting.

“For certain causes offered before us in our said Chancery, we command, and strictly injoin you, that laying all other matters aside, and notwithstanding every other excuse, you personally be and appear before us, in our said Chancery, immediately after the receipt of this writ, wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you; and to do further, and receive, what our said court shall have considered in this behalf; and this you may in no wise omit, under the penalty of one hundred pounds; and have there this writ. Witness ourself at *Westminster* the third day of *February* in the thirtieth year of our reign.”

Indorsed. By the court to make a better answer at the suit of *John Drake*, complainant.

Label. *James Thompson* to appear in Chancery immediately to make a better answer at the suit of *John Drake*, complainant.

The writ when sealed is left at the *subpena* office, where the solicitor calls to take it away; the defendant must answer over in eight days, exclusive of the day of service; or in a town cause he may obtain an order for a month generally to answer the exceptions, and in a country cause an order for a commission, and six weeks time to return it; and if the answer is not returned before the time of the expiration of the order obtained by the defendant, the plaintiff may award the ordinary process to enforce an answer,

answer, unless the defendant has obtained an order for further time, which is discretionary in the court.

The master reporting the answer insufficient in any of the points excepted to by the defendant, must answer again to those parts of the bill in which the master conceives the answer insufficient, unless by excepting to the master's report, he brings the matter before the court, and there attains a different judgment: but if the defendant has insisted on any matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer, and taking the opinion of the court, whether he ought to be compelled to answer farther to that point or not.

^a Ves. 491.

Where the first answer is reported insufficient, and the party taken on process for not putting in a further answer, he afterwards puts in a further answer and pays the costs of the contempt, (for until then, it is no answer,) the course is, that he must be discharged; and if the answer is afterwards reported insufficient, you may carry on the process of contempt at the process you left off, for the defendant should not lie in custody until the master reports whether the answer is sufficient or not, which may be reported either way, and that after a long time. In case of an insufficient further answer, you are to take up your process of contempt just where you left off, which could not be, if the defendant was to lie in custody

^a Ves. 111. during that time.

Clubb v.

Brubson, sed vid. 2 p. Will. 482. anon. where it is said, that if a defendant be in contempt to a serjeant at arms for want of an answer, and then puts in an insufficient answer, and the clerk in court accepts the costs of the contempt, this acceptance purges the contempt; and in the process of contempt for the second answer, the plaintiff must begin again with an attachment, (the first process,) and cannot begin where he left off. Idco quære.

If

If an answer be filed in term, the plaintiff must deliver his exceptions the same term, or within eight days after; but if the answer be filed in the vacation, the plaintiff hath eight days after the beginning of the next ensuing term to put in exceptions; and they cannot be put in afterwards without an order, or consent of the other side; and if the exceptions are not put in in time, the defendant's clerk sometimes will not receive them, in which case the plaintiff must obtain an order upon motion or petition for leave to file his exceptions, which is granted of course, unless two terms have elapsed since the coming in of the defendant's answer; as if an answer comes in in *Michaelmas* term, and the plaintiff does not take exceptions within eight days of *Hilary* term, upon application to the court, he is of course entitled to take exceptions, provided he does it within two terms, inclusive of the term in which he moves; but if he neglect to do it then, the court will not give leave but under very particular circumstances.

3 Atk. 19.

When cause is shewn for a continuance of an injunction upon exceptions filed to the answer, and when the court puts the party upon procuring the master's report in four days, as it is always done in such cases, there the party is to take out and serve his warrants with all possible dispatch, and a day's notice to attend is sufficient; as, if the warrants be taken out in the morning, to attend in the evening, because the party has but four days to procure the report; and if he fail therein, he loses the benefit of his order; but where the master cannot finish his report in four days, the solicitors usually agree that the master shall date his report as within the four days, and give him a little longer time to consider

sider of it; or the master may certify that the time is too short, and the court upon reading such certificate will allow such further time as the master shall certify he wants: so in an injunction cause, the plaintiff should file exceptions to the answer, before the defendant can have an opportunity of moving to dissolve the injunction *nisi*; for although the plaintiff, on the day for shewing cause, shew exceptions to the answer for cause against dissolving the injunction, yet he will be put upon term of procuring the master's report in four days, or the injunction will be dissolved without further order.

If the first answer be reported insufficient, the defendant is to pay forty shillings costs in a town cause; and if taken in the country by commission, two pounds ten shillings; three pounds for a second insufficient answer; four pounds for a third; five pounds for a fourth; and the fourth answer being reported insufficient, the plaintiff may move on the master's report filed, that the defendant may stand committed; and be examined upon interrogatories to the point reported insufficient; and the defendant shall not be discharged till he has put in a full and sufficient answer, by answering those interrogatories, and paid the costs of the contempt; and this rule of committing the defendant is grounded upon good reason, because in this case the plaintiff may be held in hand a year or more before he obtains a sufficient and perfect answer, a delay which the court will never endure.

If the master reports the answer insufficient in one single exception, the defendant must except to the report, or submit according to the report; if he doth not except, but submits to answer over, he must take care to put in a full answer;
for

for having once submitted to answer over, he has allowed the judgment of the master to be good against him; and in this case he shall not insist by his second answer that he ought not to answer the exceptions; nor shall he in case of a single exception afterwards except to the report, and bring it on for the judgment of the court, whether he ought to answer over or not; for this he might and ought to have done at first, and there he would have had the opinion of the court whether his first answer had been good or not, which upon his second answer he can never have, because he has concluded himself by submitting to answer according to the report.

But it is conceived this rule does not hold good in all cases; for where the master reports the answer insufficient in three or four, or more exceptions, it often falls out that one or more of these exceptions are fatal to the party; and so it would appear if the party excepted to the report: and therefore in these cases the party may submit to answer over as to such of the exceptions which he believes to be against him; but as to the others, if he is advised that his first answer is full in those points, or if they are of such a nature as ought not to be answered, or altogether immaterial, the defendant in these cases may, notwithstanding he has put in a farther answer to the report, afterwards except thereunto, and have the opinion of the court thereon; and it was never held that he was in that case concluded by the report, or bound to answer according to the report.

If the first answer be reported insufficient, the defendant, if he answers again without excepting to the report, must answer all the points reported insufficient, although the same exceed
the

1 Chan. Ca.
60. Eq. Ab.
35. ca. 6.

the charge in the bill; and the plaintiff, in such case, may also, by motion or petition, obtain an order to amend his bill without costs, amending the defendant's copy of the bill.

3 Will. Rep.
240.

It was held that when the court orders, that the plea shall stand for an answer, without saying more, it must be intended a sufficient answer, an insufficient answer being as no answer: wherefore this being taken to be a sufficient answer, and no express liberty to except, the order that was made to refer the exceptions, and the exceptions themselves, were discharged.

Ibid. 326,
327.

If there is a demurrer to part of the answer, and an insufficient answer to the residue, the plaintiff cannot except until the demurrer is argued; but if the defendant answers to a bill as to matter of discovery, and pleads only as to matter of relief, the plaintiff may except to any matter of discovery before plea argued, because it is plain, that no matter of discovery is covered by the plea.

Pract. Reg.
170.

No exceptions can regularly be taken to an answer after replication put in; for by the replication it is admitted sufficient; yet in some cases the court has ordered the replication to be taken off the file, and suffered exceptions to be put in.

Ord. Chan.
114.

No new commission shall be awarded for taking a second answer, till the costs of the first insufficient answer be paid; nor then but by order on affidavit of the party's inability to travel, or other good matter, to satisfy the court touching the delay, or by assent of the plaintiff, or his clerk in court, for expediting the cause; but such second commission is usually consented to.

So after an answer was reported insufficient, and the defendant had appeared upon a new subpoena,

pana, before any attachment against him was sealed, yet the court would not suffer him to except to the report, although he had paid down the sum appointed to be deposited upon excepting to a master's report.

Ord. Chan.
124.
Pract.
Reg. 173.

The insufficiency appearing on the exceptions, is to be insisted on; and no new exception can be put in.

On exceptions to an answer, the defendant having sworn he received no more than the sum of ——— to his remembrance, was allowed to be a good answer.

1 Vern. 470.

Three defendants put in a joint and several answer, which is reported insufficient; two of them waive exceptions, the other insists upon having them argued: allowed.

Ayls 461

Where a first answer, upon exceptions longer than the bill, is reported insufficient; the defendant, if he submit to put in a further answer without excepting to the report, is to answer all the points excepted unto, although the same exceed the charges of the bill; for by not excepting to the report he has admitted he ought to answer all the matters of the exception.

1 Chan. Caf.
60.

If the plaintiff procure a reference of an insufficient answer, and the same be reported good, the plaintiff shall pay the defendant forty shillings costs; and the defendant may proceed for recovery of these costs by *subpana* and attachment in like manner as the plaintiff, in case the report be in his favour.

Ord. Chan.
101.

Gillb. Chan.
103.

Where an exception is taken to an answer, a defendant cannot protect himself by saying, that he is a mere witness, but he should have availed himself of that by plea or demurrer; having submitted to answer, he must answer fully.

Cookson v.
Elliott, 2

Brown's Chan. Rep. 252. in this case the Lord Chancellor said that the practice of making a mere witness a party was extremely wrong, and that he should have encouraged a plea or demurrer, had it come on in that shape.

The Practice of the

It was ruled in the Exchequer in an exception to an answer, that if the bill prays that the defendant may set out deeds in *hæc verba*, defendant is bound to do it; and if he does not, the exception is good; but if the bill only prays, that they may be left in the hands of the clerk in court, if the defendant sets them out, but does not leave them with the clerk in court, it is not matter of exception; and the same rule holds in the court of Chancery: but although the latter is not matter of exception, it is proper to pray so; for if the defendant admits the deeds to be in his custody, the court must be moved upon coming in of the answer, that the defendant may leave the deeds in the hands of his clerk in court for the plaintiff's inspection, and the court will order the same accordingly.

As where the plaintiff claimed by virtue of a remainder in tail expectant on tenant in tail dying *sans* issue, and was also heir male of the family, the defendants were heirs general of the tenant in tail, and by their answer shewed that their brother, tenant in tail, had suffered a common recovery, and declared the use to himself in fee, and referred to the deeds in his custody; a motion was made that the defendants should produce the deeds making the tenant to the *præcipe*, and leave them with their clerk in court; and

Lord Talbot granted the motion; for it is admitted this will be done on the hearing of the cause, so it is proper to do it before; for if the deed is a proper one, the plaintiff will go no farther; and the defendants, by referring to the deeds in their answer, have made them part thereof.

3 P. Will.
301.
Bevison v.
Farniton
and others.

When

When a defendant pleads or demurs to any part of the discovery sought by a bill, and answers likewise, if the plaintiff takes exceptions to the answer before the plea or demurrer has been argued, he admits the plea or demurrer to be good; for unless he admits it to be good, it is impossible to determine whether the answer is sufficient or not: but if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea is argued.

A plea or demurrer, accompanied by an answer to any part of the bill, even a denial of combination merely; if the plea or demurrer be over-ruled, the plaintiff must except to the answer as insufficient, and the defendant need not put in any further answer, until the plaintiff has taken exceptions: but if a plea or demurrer be filed without any answer, and be over-ruled, the plaintiff in such case need not take exceptions, the defendant must answer the whole bill, as if no defence had been made to it, and the ordinary process of contempt may be awarded to compel an answer, as if no answer had come in.

3 P. Will.
327. Note S.
See however
3 Atk. 290.
where it is
said that no
exception
can be taken
to an answer
whilst a plea
is depending;
for that must
first be re-
moved out
of the way.

Bunb. 123.

Words of course preceding Exceptions to answering for Insufficiency.

In Chancery. Between A B, plaintiff,
C D, defendant.

Exceptions taken by the complainant to the answer put in by the said defendant, to the said complainant's bill of complaint.

First Exception—For that the said defendant hath not answered and set forth according to the

The Practice of the

best of his knowledge, information, remembrance, and belief, whether, &c.

Second Exception—For that, &c.

In all which particulars the said complainant humbly insists, the said defendant's said answer is altogether evasive, imperfect, and insufficient; wherefore the said complainant doth except thereto, and humbly prays that the said defendant may be compelled to put in a full and sufficient answer to the said bill of complaint.

C H A P. VI.

Of referring an Answer for Scandal or Impertinence.

IT has been already observed, that a plaintiff in a bill exhibited by him in this court, is to avoid the insertion of matter foreign and irrelevant to the merits of his case; so also, a defendant in his answer ought to observe equal circumspection in that respect, and to be careful not to introduce into his defence any circumstance, matter, or fact, which it is probable in a subsequent reference to a master will be deemed scandalous or impertinent.

When a plaintiff therefore is advised by his counsel, that the answer put in to his bill contains matters coming within the description of either scandal or impertinence, or of both, upon application to the court by a motion of course, the plaintiff will obtain an order to have the answer referred to a master, to look into the same, and certify whether any scandalous or impertinent matter be contained in it, or not.

This order of reference is served upon the defendant's clerk in court, and the same attended by the adverse parties before the master, the like regulations, and similar proceedings being pursued previous and subsequent thereto, as upon a reference to a master of exceptions taken to an answer for insufficiency: and those proceedings having been stated at large in the preceding chapter, a repetition of the same under this head is unnecessary.

If the master certify that the answer contains scandal or impertinence, or both, an order may be obtained by motion of course grounded upon this certificate, that the master may expunge the scandal or impertinence, and tax the party his costs; and this order being obtained, the record is brought from the six clerk's office, and produced at the master's by the clerk in court who filed it; and the master thereupon proceeds to expunge the objectionable matter, by striking his pen through the words which are scandalous or impertinent, and setting his initials against the parts expunged.

The party in whose favour the report is made (in case no exceptions are taken thereto) is entitled to his costs; but previous to the same being taxed by the master, he leaves a bill of costs at the master's office, and takes out and serves on the adverse party's clerk in court, a warrant to attend the taxation of the bill of costs. After three warrants to proceed are regularly served, if no person attend on the other side, the master will proceed *ex parte*, the person who served them first making affidavit of the service. To recover these costs the party takes out a *subpoena*, to procure which he leaves at the *subpana*

The Practice of the

pæna office, a *præcipe* in the following form, producing the master's report at the same time.

" *Subpæna*, *James Atkyns*, Gentleman, to pay five pounds costs to *Henry Barker*, Esquire, or bearer.

" *Tested*, 9th *February* 1790.
Price, solicitor."

The form of the writ.

" *George* the Third, &c. To *James Atkyns*, Gentleman, greeting. We command and strictly enjoin you, that you pay or cause to be paid immediately after the receipt of this writ to *Henry Barker*, Esq; or the bearer of these presents, five pounds costs, by our court of Chancery adjudged to the said *Henry Barker*, for his costs, charges and expences, had and sustained in the same court by means and occasion of your unjust vexation; and this you may in no wise omit, under the penalty of one hundred pounds. Witness ourself at *Westminster*, the ninth day of *February*, in the thirtieth year of our reign."

Indorsed, "By the court."

Label, *James Atkyns*, Gentleman, to pay five pounds costs to *Henry Barker*, Esq; or bearer.

This *subpæna* must be served on the adverse party personally; and an *actual* demand made of the costs at the same time by the person serving the process, and his receipt will be a sufficient discharge; and upon affidavit of due service, demand, and refusal to pay, an attachment issues, and so further process, contempt, as in other cases.

But when an affidavit is made that the party to whom the *subpæna* is directed is not to be found, the court on motion or petition will order, that

leaving

leaving the *subpoena* with his clerk in court, or at his last place of abode, (as the court shall see fit,) shall be good service; so an oath made, that the party confessed he was served with this process, and had not paid the costs, was held sufficient.

Ord. Chanc.
54. 116.

Cary's Rep.
261.

If the plaintiff refers the answer for scandal and impertinence, and the master finds the answer neither scandalous nor impertinent, the plaintiff, on excepting to the master's report, must in his exceptions shew wherein, in what line or page, and how far, the answer is scandalous or impertinent, in order that such part of the said answer may be expunged by the master; and it is not sufficient in the exceptions to say in general that the answer is scandalous and impertinent: it seems to be a stronger case where exceptions are taken to an answer for insufficiency, and the master reports it sufficient, that the plaintiff in his exceptions to the master's report should shew wherein the answer is insufficient.

2 P. Will.
182 Sed. vid.
2 Atk. 182.
where a bill
was referred
to a master
for imperti-
nence, the
master

reported it pertinent, the defendant took a general exception to that part of the report, without specifying the particular parts of the bill which were impertinent; for this reason it was objected, that the exception was irregular, and contrary to the course of the court: *Lord Hardwicke* held that notwithstanding the exception was taken in so general a manner, yet it may be gone into, without pointing out particular passages.

So if a bill or answer be referred for scandal, and reported by the master to be scandalous; if the master has once expunged this scandal, the party cannot then except to the report, because, when the scandal is expunged, it cannot be made appear by the record what that scandal was, and it was the party's own fault that he did not except to the report sooner.

Ibid.

C H A P. VII.

Of Exceptions to the Master's Report of an Answer being insufficient, scandalous, or impertinent.

THE report of the master, who is only a ministerial and subordinate officer, is not conclusive, if either party chuses to appeal from the same to the judgment of the court, by taking exceptions to the master's report or certificate; and as there is no precise time prescribed by the court, wherein exceptions are to be filed to a report which requires no further act of the court for confirmation, it is advisable for a party who intends to except to a report or certificate of this kind to be expeditious; because, upon an answer being reported insufficient, the plaintiff may, upon filing the report, immediately issue and serve a *subpœna* for costs, and another *subpœna* for a better answer; and it may happen that an attachment for costs may be awarded and executed before the party excepting can procure an order to set down the exceptions *to be heard*; the mere act of filing exceptions, and making the deposit, will not preclude the adverse party from proceeding for his costs, and for a further answer.

The exceptions must be drawn, or perused and signed by counsel, and must be fairly transcribed upon parchment or paper, upon each skin or sheet of which there must be a treble six-penny stamp; and when prepared, the exceptions must be filed with the register, and five pounds deposited with him, as a stake to recompense the other party, if the court, upon arguing the exceptions, shall find the same frivolous, and disallow them accordingly.

A cer-

A certificate of the deposit being left, must be procured from the register, and annexed to a petition to be presented as soon as conveniently may be to the Lord Chancellor, for an order to set down the exceptions to be argued; the petition and certificate are to be left with his Lordship's secretary, and ten shillings paid when the petition is taken away answered; the petition answered must be left at the register's office, to have the order for setting down the exceptions drawn up and passed: a copy of the order being made, and entered at the same office, and one shilling paid for the setting down the exceptions with the register, the order itself must be served by delivering a true copy thereof to the adverse clerk in court *personally*, or leaving a copy with his agent at his seat in the fix clerk's office, in either case shewing, at the time of the service, the order passed and entered. The time for setting down the exceptions, is generally within four days from the date of the order, the order itself injoining the party so to do, and to give notice forthwith, or the order to be of none effect. The register, in all cases of exceptions filed to reports or certificate, as well those requiring confirmation as those which do not, sends a note in writing to the clerk in court for the party against whose report exceptions are filed, and deposit made, acquainting him of the exceptions and deposit.

The exceptions being set down to be argued, both parties prepare briefs, and give instructions to counsel to argue the same; and the exceptions coming on to be argued, the Lord Chancellor, on hearing the arguments adduced for and against the report, gives judgment,

ment, and either allows or disallows the same; the consequence of allowing the exceptions, entitles the party excepting to take back his deposit, (five pounds,) and his answer is adjudged to be sufficient, if the report certified it to be otherwise; so on the other hand, by a disallowance of the exceptions, the party succeeding takes the deposit, and the report is adjudged to be right: the five pounds deposit is in lieu of all costs to which the party obtaining judgment in his favour would otherwise be entitled.

The consequence of disallowing exceptions to a report of an answer being insufficient, is the establishing the report, and the defendant must put in a further answer; and in cases of scandal or impertinence, a disallowance of exceptions to a report certifying the record referred, to contain scandalous or impertinent matter, confirms the opinion of the master as certified in his report; and the court will sometimes at the arguing make an order that it be referred to the master to expunge the scandal or impertinence; or if no order of that nature be made, but the exceptions are disallowed, without saying any thing further, the party may apply by motion of course, upon the foot of the order for disallowing the exceptions, to refer the record to the master to expunge the scandal or impertinence; and so soon as exceptions to a report of an answer being insufficient are struck out or disallowed, the plaintiff may immediately sue out and serve a *subpœna* upon the defendant to make a better answer, and the ordinary process of contempt may be awarded if default be made.

Note, the court may exercise a discretion according to the exigency of the case, and give costs

costs or not as it sees cause; and sometimes it orders that each party bears his own costs.

So where exceptions are taken to a defendant's answer for insufficiency, and the master reports it insufficient, and upon exceptions the court is of opinion it is sufficient, the party succeeding in this application shall not have his costs, but they shall wait the event of the cause; and for this reason, because the plaintiff's proceeding did not appear to be a proceeding merely vexatious, but in the opinion of the master well founded; and the rule of the court is never to give costs but where there appears to have been no just grounds for the proceeding. 3 Atk. 235.

So if, upon hearing the exceptions in court, it shall appear that the party excepting did not offer his objections to the master, but depended upon his appeal to the court, and by that means sought delay, though the exceptions happen to be allowed, yet the party for his neglect, and being the occasion of trouble to the court, and charge and delay to the adversary, shall pay such costs as the court shall think reasonable. Ord. Chan. 202.

If an answer, is by the master, on the first exceptions, reported insufficient, and the defendant submits to answer, or slips his time for putting in exceptions to the report, and upon exceptions to that second answer the like report is made, the defendant may except to the second report, and bring it before the court: where there are several exceptions, the court has always said, that as this matter has not undergone the judgment of the court, it shall be gone into: perhaps it might be otherwise if it were only a single exception.

2 Ves. 492.

All

The Practice of the

All reports and certificates, made and signed by any of the masters, shall be filed with the register within four days after making and signing; and the register shall mark on the back thereof the day of its receipt and filing: and all proceedings grounded on such report or certificate, not filed as aforesaid, shall be utterly void; and the register's certificate of such neglect shall be a good cause for the court to discharge the proceedings thereon, and for such further costs against the party offending as the court shall think fit.

Ord. Chan.
237.

But notwithstanding it has been held to be the settled practice of the court, that it is sufficient if the report is filed before any proceedings had thereupon, though this was not done within four days after the making; and that this was the spirit of the order, though the letter seemed otherwise; and the constant practice being according to this construction, many hundred reports would be liable to be set aside, if the order should be literally observed: and the Lord Chancellor declared, that the intention of the court in making the said order of the 29th October 1692, for filing the master's reports in four days after they bear date, was, that no proceedings should be grounded upon reports until the same were filed; and the practice of the court has been not to confirm any report till the same was filed.

2 P. Will.
518.
Reg. Lib.
A. 1728,
fol. 259.

An order for time to answer the exceptions is, *ipso facto*, a submission to answer, and absolutely precludes the defendant from excepting to the report.

Words

*Words of Course preceding Exceptions to a
Master's Report.*

" In Chancery, between A B, plaintiff,
C D, defendant.

" Exceptions taken by the said complainant
to the Report of *John Ord*, Esq. one of the
Masters of this court, made in this cause,
and bearing date the 20th day of *January*
1790.

" *First Exception.*—For that the said master
hath in and by his said report stated, &c.

" *Second Exception.*—For that the said master
hath in and by his said report certified, That,
&c.

" In all which particulars, the said com-
plainant doth except to the said mas-
ter's said report, and humbly appeals
therefrom to the judgment of this ho-
nourable court."

Sometimes a party, for delay, will set down
exceptions, and will not appear at the hearing;
the exceptions, upon such default, are disal-
lowed of course, and the deposit ordered to
the opposite party if he appears; who in such
case must make an affidavit of his being serv-
ed with the order for setting down the excep-
tions, and produce an office copy of the affi-
davit, filed at the affidavit office, to the regis-
ter, before the order is delivered out to him,
with the deposit: but if neither side appear when
the exceptions are called on, they will be struck
out of the paper, and the party excepting may
apply

apply for his deposit; and so soon as exceptions to a report of an answer being insufficient are struck out or disallowed, the plaintiff may immediately sue out and serve a *subpœna* to make a better answer, and the ordinary process of contempt may be awarded, if default be made.

Of Pleas.

A PLEA in equity is a special matter pleaded by a defendant to a bill, or to some part thereof, shewing and relying upon one or more facts set forth in the plea, as a cause why the plaintiff ought not to be relieved in some matter contained in his bill, and in bar to any relief or discovery sought after and prayed by the bill. It is nothing more than a special answer, shewing or relying on one or more things as a cause why the suit should be either dismissed, delayed, or barred.

Pract. Reg.
273.

In a plea, it is proper to produce facts and averments to support the plea, which facts must conduce to one single point; for the defence proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and is to save the parties expence in examination; and it is not every good defence in equity that is likewise good as a plea; for where the defence consists

2 Ves. 245.
Per Lord
Thurlow, 1
Brown's Ch.
Rep. 417.

consists of a variety of circumstances, there is no use of a plea, the examination must still be at large; and the effect of allowing such a plea will be, that the court will give their judgment on the circumstances of the case before they are made out by proof.

1 Atk. 54.
2 Ves. 245.

As the plea is intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea, and rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence, the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff in a replication, and the parties may then proceed to examine witnesses, the one to prove, and the other to disprove, the facts stated by the plea.

Treatise upon Pleadings by English Bill, 15.

Having premised the foregoing observations in respect of the general nature of a plea in equity, it will be proper, in the next place, to consider the several kinds of pleas, with a reference to the heads under which they are usually arranged, viz. a plea to the jurisdiction;—to the person of the plaintiff or defendant;—in bar of the suit.

C H A P. I.

Of Pleas to the Jurisdiction.

THOSE pleas which are commonly termed pleas to the jurisdiction of the court, do not dispute the rights of the plaintiff in the subject of the suit, or that they are fit objects of the cognizance of a court of equity, but simply assert, that the court of Chancery is not the proper court to take cognizance of those rights; and upon this ground the defendant may demand the judgment of the court, whether he shall be compelled to answer the bill*.

* Ch. Prac.
417. 420.

† Treatise
upon Plead-
ings by
English Bill,
182.

Vide also
Com. Dig.
Chan. 56.
2 Chan. Caf.
41.

Nelf. Rep.
37. 66.
Cary's Rep.
55. 56. 73.
2 Vent. 362.

Pleas of this nature arise principally when the suit is for land within a county palatine, or where the defendant claims the privileges of an university, or other particular jurisdiction †.

The court of Chancery being one of the King's superior courts of general jurisdiction, it is not sufficient that the defendant in a plea to the jurisdiction of this court do shew negatively that this court has not jurisdiction of the matter in dispute between the parties, or that it arose out of its jurisdiction; but the defendant must not only allege, but shew that the court has not jurisdiction of the subject, and by what means it is deprived of jurisdiction; and also what other court has jurisdiction; for the presumption is, that nothing shall be intended to be out of its jurisdiction which is not alledged and shewn to be so; for this court is not to be put upon a level with an inferior court of a limited local jurisdiction, within whose

whose jurisdiction nothing shall be intended to be which is not alledged to be so. 1 Ves. 203, 204.

Thus to a bill brought to have an account of the profits of the *Mendippe* mines in *Somersetshire*; a special act of parliament was pleaded, which had given jurisdiction of all matters arising within the mines to the courts of —, exclusive of all other jurisdiction; but the plea was disallowed, because although an exclusive jurisdiction is pleaded, yet it is not averred that there is any court of equity there. 1 Vern. 59.

So where the defendant pleaded to the jurisdiction of the court; that the *Isle of Man* was an ancient kingdom, not part of the realm, though belonging to the crown of *Great Britain*, and that no lands, &c. there ought to be tried or examined unto here, and demanding judgment whether he should be put to answer further: It was objected to this plea for the plaintiff, that although it is shewn in the negative, and alledged, that this court has no jurisdiction over the *Isle of Man*, and that the subject in dispute is not to be tried here; yet it is not shewn in the affirmative, what other court has jurisdiction, or that there are any courts in the *Isle of Man* holding plea thereof; and the rule was insisted on, that whoever pleads to the jurisdiction of one of the King's superior courts of general jurisdiction, must shew what other court has jurisdiction; and the plea was for this reason held to be bad, and accordingly disallowed. 1 Vern. 89. 1 Ke. 203. ibid.

C H A P. II.

Of a Plea to the Person of either Plaintiff or Defendant.

IN a plea in respect of the person of the plaintiff, it may be shewn, that he is disabled to sue as being outlawed, or excommunicated, or a popish recusant convict, or attainted in a *præmunire*, or of treason or felony, or an alien, or that the plaintiff or defendant is not such a person as is alledged, viz. feme sole, heir, executor or administrator, &c. and therefore ought not to sue or be sued for the matter in question.

Pract. Reg.
376.

Ibid.

Ord. Chan.
98.

1. A person outlawed is disabled from suing in a court of justice; and if a bill is filed in his name, the defendant may plead the outlawry; the record of the outlawry or the *capias* thereupon, must be pleaded *sub pede sigilli*, and is usually annexed to the plea: the plea continues only in force till the outlawry is reversed, but hinders all proceedings in the mean time; and when the outlawry is reversed, the plaintiff, upon paying 20s. costs (if the plea is not argued), serves the defendant with a *subpœna* to answer the same bill.

To an information the defendant pleaded outlawry in the relator; and it was long debated, whether the plea was good or not, and at length the plea was allowed to be good; for though the Attorney General is the plaintiff, yet the relator is to have the whole benefit or loss of the suit, and is himself party to it, for it would abate by his death, &c. and the king's

name

name is only made use of by the form of the court, and he is not directly concerned at all, and very little by consequence; and the suit is not for the king's duty, but the relator's interest.

Prec. in
Chan. 13.

2 Eq. Caf. Abr. 1. c. 2. Note, the relator in this case seems to have sustained the character of plaintiff as well as relator. Vide Treatise upon Pleadings by English Bill 186, in *notis*. Vide also 3 Bac. Abr. 762, 2 Bulst. 134. And. 30.

If the bill be for relief against an action at law, and outlawry is pleaded by the defendant in the same cause, it is a bad plea, because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*: so outlawry in executor, administrator, guardian, or *procbein amy*, is no good plea, because they do not claim in their own right; and the real plaintiff being the testator or infant, outlawry in any third person is no exception against him, why he should not be admitted to sue.

Gilb. Chan.
54.
Ord. Chan.
119.

Outlawry must be pleaded before answer; for after answer, the defendant admits the plaintiff a proper person to be answered to, and therefore such plea would then come too late; but if an outlawry be not pleaded, yet it may be shewn at the hearing, as a peremptory matter against the plaintiff's demands, if the same are personal, because it shews the right of the thing in demand to be in the king; the defendant is not obliged to set down this plea as he must other pleas in eight days, or they will stand over-ruled; but the plaintiff must set it down, if he is advised that there is any insufficiency in point of form in pleading it; for being *sub pede sigilli*, it appears upon shewing to be a good plea, and therefore is not presumed necessary to be argued.

Z 2

2. So ^{Ibid.}

2. So the defendant may plead excommunication in the plaintiff, which must be certified by the ordinary, either by letters patent containing a positive affirmation that the complainant stands excommunicated, and for what cause, or by letters testimonial, reciting *quod scrutatis registeriis invenitur*, &c. and either of them must be pleaded *sub pede sigilli*.

Praet. Reg.
277, 278.

Excommunication is a good plea to an executor or administrator, though they sue in *auter droit*: but excommunication in a *prochein amy* or guardian cannot be pleaded or alledged in disability where an infant sues, or is sued by him.

Co. Litt.
134. 4 Bac.
Abr. 36.

Praet. Reg.
278.

This like the plea of outlawry ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters of absolution, may, as at law, sue out fresh process, and compel the defendant to answer the bill.

Ibid.

3. By statute 3 Jac. 1. c. 5. sec. 11. every popish recusant convict is in many cases disabled to sue, in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports; nor does the form of the plea appear in the books of practice. If advantage was attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law.

Treatise upon Pleasings
by English
Bill 186.
Vide also
3 Bac. Abr.
780. 181.
Lutwych,
11CO.

Ibid.

This plea ceases also to be a bar, if the plaintiff by conforming removes the disability.

4. A plea of attainder in the plaintiff is equally rare; and it would probably be likewise judged with equal strictness as if it was a plea at common law.

2 Atk. 399.

5. There

5. There is so rarely an occasion for the plea of alienage, that little needs be said about it; only it may be observed, that where an alien *enemy* is come here for refuge and protection, or has lived here peaceably a long time, the court will probably discountenance such pleas against him, and would make no presumption in favour of them.

Pract. Reg.
278.
2 Atk. 299.
2 Ver. Abr.
274. (alien)
Rattel's En-
tries, 252.

A bill was brought for an account against the representatives of an *East India* governor, who pleaded that the plaintiff was an alien born and alien infidel, and could have no suit here.

Lord Chancellor said, As the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court: and over-ruled the defendant's plea, without hearing counsel on either side.

Ramkissen-
sen v.
Barker and
others,
1 Atk. 51.

The necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens; a *Jew* may sue at this day, but heretofore he could not; for then they were looked upon as enemies, but now commerce has taught the world more humanity; and therefore, it has been held that an alien *enemy*, *commorant* here by licence of the king, and under his protection, may maintain debt upon a bond.

Wells v.
Williams,
1 Lord Ray-
mond 282.

It appears then from the cases last cited, that an alien, who is not alien enemy, is under no disability of suing for any personal demand, and an alien enemy may sue under some circumstances.

Ramkissen-
sen v.
Barker,

Wells v.
Williams.

Vide also 3 Burn. 1741. 1 Bac. Abr. 84. Douglas 619. Cornu and Blackbourne; and the case of Anton and Tusker in note 1. p. 626; but the latter case was afterwards reversed in the Exchequer Chamber, 16th November 1784. Treatise upon Pleadings by English Bill, in notes, 188.

Pract. Reg.
276.

6. If a bill be filed in the name of any person incapable *alone* of instituting a suit; as an infant, a married woman, or an idiot or lunatic, so found by inquisition; the defendant may plead the infancy, the coverture, or the inquisition of ideotcy or lunacy, in abatement of the suit.

1 Vern. 473.

Treatise upon Pleadings
by English
Bill 189.
Ord. v.
Huddleston,
Trin. 1773.
in Chan.

7. A plea that the plaintiff is not the person that he pretends to be, and does not support the character he assumes, and therefore is not intitled to sue as such, though a negative plea, is good in abatement of the suit; as where a plaintiff intitled himself as administrator, and the defendant pleaded that he was not administrator; and where a plaintiff intitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living, the plea was allowed.

But in a late case, wherein the plaintiff by his bill claimed to be intitled as heir at law to certain estates in the bill, and deduced his title as such; a plea that the plaintiff *is not heir* was held to be bad: in the argument of this case, it was said in support of the plea, that although this was in the negative, it is a good plea, as *not administrator* is a good plea, though in the negative; and that, in the present case, it was the only defence the defendant could have to avoid the discovery that the plaintiff was not heir; the plaintiff might reply, and then the matter would come in issue, whether the plaintiff was heir or not; and the *Practical Register* 276 was cited, wherein it is said, that a plea may shew that the plaintiff is not such a person as is alledged, as *feme sole*, heir, &c.

Or

On the other side, it was argued, that this plea, which was stated to be a plea in bar, was bad in form; for all pleas which go to the person of the plaintiff, are pleas in *abatement*, not in *bar*: a plea must not only traverse facts contained in the bill, but it must state a *new case* out of the bill; a plea of purchase for valuable consideration does this, for it states there was no notice of the plaintiff's equity; in the present case the plea only denies what is stated in the bill. And the case of *Gun v. Prior*, 16th December 1785, was cited, where, to a bill of the like kind with this, there was a plea in bar that the plaintiff was not a relation, or of kin to the person under whom she claimed; but that plea, as being a mere negative plea, was disallowed: a plea of *not administrator* is a mere plea in abatement; it is only that the plaintiff has not as yet obtained letters of administration; and so the present, being a mere negative plea, ought not to be allowed.

Lord Chancellor: This plea, if it is any thing, is a plea in abatement, wherein you traverse the plaintiff's right; as, where you plead that he has never administered: a plea in bar is collateral to the bill; a plea in abatement is a traverse; you never traverse in a plea in bar: The single question is, whether a plea that the plaintiff is not *heir*, is a plea in abatement? In the *Practical Register*, *not heir* is reckoned among the pleas in abatement; it is a good book, and seldom mentions any thing even so slightly as it does this, without authority: but no instance is produced where such a plea was admitted: the defendant can never be admitted to traverse that the plaintiff was *heir*, but he must swear to all the particulars

2 Brown's
Chan. Rep.
147.
Newman v.
Wallis and
another.

which amount to shew him not to be heir; as in the case of a purchaser for a valuable consideration, if the bill charge particulars of notice, the defendant must deny all the circumstances particularly, and not generally deny notice. This plea stood over for further consideration; but was at last, upon the grounds above-mentioned, over-ruled.

Pract. Reg.
276.

Ibid. 278.
1 Cary Rep.
37.

A plea that the defendant is not the person he is represented to be, or that he has not such a character to sustain as is charged by the bill, is mentioned as a plea which may be supported; but it is said, that in such a case it was ordered, that the defendant should put in his allegations upon oath, by way of answer, and then desire judgment, whether he should be compelled to answer the bill, and pray his costs for his urgent vexation; but this in fact amounts to a plea, though it may not bear the title.

C H A P. III.

Of Pleas in Bar.

Treatise upon
Pleadings
by English
Bill 195.

A PLEA in bar is commonly where some foreign matter or thing is shewed whereby, supposing the subject of a suit may be within the jurisdiction of a court of equity, and the court of Chancery may have the proper jurisdiction, though the plaintiff may be under no personal disability, and may be the person he pretends to be, and may have a claim of interest in the subject, and a right to call on the defendant concerning it, and the defendant may be the person he is stated to be, and may claim an interest

terest in the subject, which may make him liable to the plaintiff's demands, still the suit, by reason of some additional circumstance, is barred. Pract. Reg. 79.

Pleas in bar are usually divided into, pleas of matter of record, or as of record in the court itself, or some other court of equity; pleas of matters of record, or matters in the nature of matters of record in some court, not a court of equity; and pleas of matters *in pais*.

Under the first branch may be ranked, first, another suit depending in this court, or in any other court of equity, between the same parties 3 Atk. 587. 590. for the same cause; secondly, a decree or order of the court by which the rights of the parties are already determined, or a dismission Ibid. 626. 1 Vern. 310. of a former bill for the same cause.

I. A plea of another suit depending in this or in any other court of equity, for the same cause, is a good plea: and where a defendant pleads the pendency of a former suit in another court for the same matter, on coming in of this plea, the plaintiff may and ought to obtain a reference to the master, and to procure his report, that the former suit is not in the same matters; and in such case the plea will be overruled; or the defendant may bring on the plea, and if it is pleaded, and both suits appear to be for the same matter, the plea is always allowed; and this plea need not be set down with the register, being a matter recorded in this court; but the plaintiff cannot plead a suit pending at law in bar of the plaintiff's demands in equity; but after the answer is come in, the defendant may put the plaintiff to his election, either to proceed at law or in equity; 3 P. Will. 90. though the practice was formerly otherwise.

Note,

Note, The order for making an election recites only, that the plaintiff prosecutes the defendant at law and in equity for one and the same matter, so that the defendant is doubly vexed; wherefore it provides that the plaintiff, his clerk in court, and attorney at law, having notice of the order, do, within eight days after such notice, make his election in which court he will proceed; and if he elects to proceed in this court (the Chancery), then the proceedings at law are by that order to be stayed by injunction: but if the plaintiff shall elect to proceed at law, or in default of such election by the time aforesaid, his bill is to be dismissed with costs: and note, if one makes a *special* election, to proceed at law as to part, and in equity as to other part; with regard to what the plaintiff in equity elects to proceed at law, his bill ought to be dismissed with costs.

Per Sir Jos.
Jekyl, mas-
ter of the
Rolls, Mi-
chaelmas
1723. anon.

Treatise up-
on Pleadings
by English
Bill, 198;
and the case
of Devie
v. Lord
Brownlow,
in Chanc.
23^d July
1723, cited
there.

A plea of this nature must aver, that the second suit is for the same matter as the first, and therefore a plea which did not expressly aver this, though it stated matter tending to shew it, was considered as bad in point of form, and over-ruled upon argument; the plea must also aver, that there have been proceedings in the suit, as appearance, or process requiring appearance at least.

The pendency of a former bill was pleaded in bar of a second; but though both bills were of the same nature and effect, yet as the latter had some new matter, it was ordered, that seeing the plea was good, the plaintiff should pay the usual costs of a plea allowed, but the defendant to answer the second bill, and the former bill dismissed with 20s. costs.

1 Chan. Caf.
241.
Crofts and
Wortley.

The

The defendant pleads that the plaintiff brought a former suit for the same matters, which suit is still pending, for ought he knows to the contrary; for the plaintiff it was insisted, that this plea was not good, because he does not positively aver that the former suit is still pending; and no issue can be taken upon his knowledge to the contrary; but the Master of the Rolls allowed the plea, because the defendant ought not to have set it down to be argued; for by that he admits that the former suit for the same matter is pending; but the plea ought to have been referred to a master to examine whether there was a former suit pending for the same matter or not; and he said, there needs no positive averment, that the former suit is still pending, for that is examinable by the master, and the defendant never swears a plea of a former suit pending.

1 Vern. 332.

A bill was brought against the defendants for tythes*; the cause was heard at the Rolls, and an account decreed, and the defendants directed to pay what should respectively be found due; to a second bill for the same matter, the defendants plead the first bill and the decree; the plea was allowed, as the defendant would otherwise be put to double expence and double vexation.

3 Atk. 591.

An administrator of a judgment-creditor brought the original bill, and died; the executor of the administrator brought a bill of revivor, which was thought to be wrong, and

* Note, It may not be improper to mention here the difference between this court and the court of Exchequer in respect of tythes: There they direct an account of tythes no further than the bringing of the bill; but here the rule of the court in general is, where an account of tythes is decreed, that it shall be carried down even to the time of the auditor's report, and not to the filing of the bill only.

thereupon

thereupon another bill of revivor was brought by the same plaintiff, having first taken administration *de bonis non*, &c. to the judgment-creditor; the defendant pleaded the bill was for the same matter, and upon this it was referred to a master to examine whether it was so, who made a special report, that *the last bill of revivor* is brought by the plaintiff in a *different right* from what the former was, but does not say it was or was not for the same matter.

Lord Chancellor over-ruled the plea, because it appears that the bill is brought by a person in a different right; but the plaintiff is not intitled to costs upon such dismissal, because the master's report is special and not general. His Lordship also laid it down, that a plea may be good for part, and over-ruled for part; but a demurrer must be good for the whole, or void for the whole.

² Atk. 44. *Higgins v. the York Buildings Company.* The reason of this determination seems to have been, that the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer.—Treatise upon Pleadings by English Bill, 200.

To a bill brought against the defendant as an executor to account, he pleads a suit in the court of Chancery at *Jamaica* brought against him by the plaintiff, with the like matter of complaint relating to the executorship; but neither the term, nor even the year in which the suit was instituted, being set out with certainty, there is not that averment which courts of law and equity both require in pleas; and as it was therefore defective in form, Lord

³ Atk. 587. *Hardwicke* over-ruled the plea: so the plea of a sentence of the court of Admiralty, which was recited in the bill, and therefore bringing no new matter, was over-ruled.

¹ Brown's Chan. Rep. 36.

A bill

A bill had been brought by a single creditor in behalf of himself and other creditors against the executor, and also the devisee of a testator's real estate; another creditor came in under the decree in that cause before the master, and proved his debt, and now brings his bill in the name of himself and other creditors of the testator against his devisee and executor, and makes the heir at law a party, who was not so to the former suit.

The devisee and executor plead the former suit is still depending.

Lord Chancellor: A man who comes in before a master under a decree is *quasi* a party to that suit; the present plaintiff does not by his bill shew it was absolutely necessary that the heir at law should be brought before the court, and therefore allowed the plea.

3 Atk. 557.

Note, The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the court for liberty to conduct the cause.

It is not necessary to the sufficiency of the plea, that the former suit should be precisely between the same parties as the latter: for if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit touching the whole property will hold.

Treatise upon Pleadings by English Bill, 199.
1 Eq. Cas. Abr. 39.

So where one part owner of a ship filed a bill against the husband for an account, and afterwards the same part owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last; for though the first bill was insufficient for want of parties, yet by the second

Treatise upon Pleadings by English Bill, 199.
1 Eq. Cas. Abr. 39.

cond bill the defendant was doubly vexed for the same cause: the course which the court has taken in such case has been to dismiss the first bill, and to direct the defendant in the second cause to answer upon being paid the costs of the plea allowed.

Pract. Reg. 280.

1 Atk. 631.
3 Atk. 626.

2. A former decree signed and inrolled, may be pleaded to a new bill for the same matter; so after a decree, if the party against whom it is made intends to review the same, but does it by way of original bill, and not in the form nor with the ceremonies of a bill of review, the defendant in this new cause may plead the decree in bar; and an infant is bound by a decree in a cause in which he is a plaintiff as much as a person of full age; and equity in this follows the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age.

2 Vef. 577.
Kinsey v. Kinsey.

But to render this plea effectual, the decree must have been signed and inrolled; so where a decree *nisi* by default, which was made absolute upon no cause shewn, was pleaded to a bill brought for the same matter, it was held and so determined, that this decree could not be insisted upon by way of plea, *because it was not signed and inrolled*; but it was permitted to stand for an answer, with liberty to except and save the benefit to the hearing.

Ibid. 450.
Senhouse v. Earl.

A decree for foreclosure in the common form, with an averment of non-payment of the money, was pleaded to a bill for redemption, but there was no final order for the foreclosure; and it was held, that as a plea it could not stand for want of such final order.

It is the standing rule of the court, that a decree must be inrolled before it can be pleaded

ed in bar to a second suit for the same matter; and where a decree not inrolled was pleaded, the same was disallowed, and directed to stand for an answer, with liberty to except; ^{3 Atk. 809. anon.} but though such decree cannot be pleaded directly in bar, it might be pleaded, to shew that the bill was exhibited contrary to the usual course of the court; and upon a plea of this nature, so much of the former bill and answer must be set forth as is necessary to shew that the same point was then in issue; for every plea that is set up as a bar must be *ad idem*; and therefore if a judgment or decree is pleaded, it must appear to be *ad idem*; so it is incumbent upon the defendant not only to plead that a bill was brought, and a decree made, but he must in such plea set forth so much of the former bill and answer as to shew that the same point was then in issue. ^{Chan. Pleas 29.}

Where the defendant pleads a decree or order dismissing a former bill for the same matter, it is a good plea, if the defendant shews it was *res judicata*, an absolute determination in the court that the plaintiff had no title to relief; but it is not sufficient that the court *implied that* when they dismissed the bill; and therefore a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill. ^{2 Atk. 603.}

Note, A decree signed and inrolled can only be altered by a bill of review. ^{1 Atk. 571.}

II. Under the second branch of pleas in bar, may be ranked pleas in bar of matters of record in some court not being a court of equity, as, 1st, a fine; 2d, a recovery; 3d, a judgment at law, or sentence of some other court.

1. A

1. A plea of fine and non-claim will bar any title in equity, as well as at law; and is a good bar thereunto; as if A has lands in trust for B, and C enters upon him and levies a fine with proclamations, this will be a good bar to B the *cestui que* trust, as well as to A, the trustee; because they are both within the same statute, and C has an opposite title, both as to the trustee and *cestui que* trust; but then C must deny that he claims from A, or if he does claim from A, he must deny that he had notice of a trust for B.

For if C claims from A, there are two cases in which the fine and non-claim would not bar.

First, If the fine was levied from A to C without consideration, there, since A was under a trust, his conveyance to C was under the same trust: so if A levies a fine to C, and C hath notice of the trust to B; there the fine and non-claim is no bar, because the conveyance by the fine is under the same trust, and therefore cannot be set up as a bar to it; so that whenever any person is charged as claiming under the trustee, he must either set up his opposite title, or deny his claim as trustee, or else if he claims under the trustee, he must set forth the consideration, and deny the notice to shew that his fine was not forfeited by the trust; for if it was, the fine and non-claim can be no bar.

So it is where a man claims under a conveyance, obtained by fraud, it only gains a legal title, and a trust arises to the right owner; and therefore, if such purchaser by fraud levies a fine with proclamation, such fine is no bar, because he himself held the estate under a trust to restore it to the right owner; and the fine itself is no more than a corroboration of the

the title, which was under the trust, and not an opposite title to it.

So if he who comes in under a fraudulent conveyance, sells by fine for a valuable consideration, and without notice of the fraud, it is an opposite title, and the fine and non-claim may be set up as a bar. Gilb. Chan. 62.

But if he sells by fine without consideration, or with notice of the fraud, though upon consideration, the trust still continues; and therefore where a man is charged to claim under a fraudulent conveyance, if he pleads a fine and non-claim, he must in this case likewise either deny his claiming under the person committing the fraud, or if he does claim under him, he must set forth, that he comes in for valuable consideration, and without notice of the fraud. Chan. Caf. 278.
Salisbury v. Baggot.

Secondly, If the equity or trust be created by the fine, that fine and non-claim shall never bar the equity created by it, for this is not an opposite title, but a title created by the fine, so that it cannot bar the trust that was annexed to it, and under which trust the *cestui que* trust held it.

Where a purchase is pleaded for a valuable consideration without notice of the plaintiff's title, it is sufficient to aver that the person who conveyed was seized, or pretended to be seized at the time that he executed the purchase deeds; but if the purchaser sets up a fine and non-claim as a bar to the plaintiff's right, it is not sufficient to aver, that at the time the fine was levied, the seller of the estate *being seized, or pretending to be seized*, conveyed, &c. but there must be an averment that he was actually seized; it is not, indeed, necessary to say, that he was seized *in fee*; for if it is

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averred that he was seized *ut de libero tenemento, et sic seifito existente quidem finis se le-*
 2 Atk. 630. *vavit*, it will do.

If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar in equity, and not affect him with notice so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied.

Ibid.

* *Ibid.* Vid.
 also Reading
 v. Boylston,
 2 Lord Ray-
 mond.—
 Earl of
 Suffolk v.

1 Lord Ray-
 mond;
 which shew
 the rules of
 pleading a
 fine.

2 Atk. 240.

Treatise up-
 on Pleadings
 by English
 Bill, 201.

The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar arising from the statute of non-claims; and in pleading a fine and non-claim there is the same strictness in equity as in law*.

A fine levied upon a bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied, but with respect to equitable titles there is a distinction: for where the equity charges the lands only the fine bars; but where it charges the person only, in respect of the land, the fine does not bar.

Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the seller, and is as much a trustee as he was; so in the case of a grantee of a mortgage, though he levies a fine, that will not discharge the equity of redemption: so where tenants give a conditional possession only, provided they may pay their rents to a third person till a suit is determined, a fine levied under such a possession will not be suffered to stand; even at law, fines will be set aside for fraud, as in the case of a tenant for years: but there are cases of

Ibid. 390,
 391.

2 Atk. 631.

of equitable, as well as of legal titles, in which a fine and non-claim will bar, notwithstanding notice at the time of levying the fine.

2 Atk. 631.

A fine and non-claim may be pleaded in bar to a bill of review; but where a defendant pleaded a fine and non-claim in bar of the title set up by the plaintiff; the plea was over-ruled, because the pendency of the suit here, as it was a matter proper for equity, has prevented the running of the fine.

2 Vern. 19.

2 Atk. 389.

A plea of conveyance, and of fine and non-claim, is not multifarious, but a good plea, to a bill impeaching the conveyance as not being for valuable consideration.

2 Brown's
Chan. Rep.
247. Doble
v. Credland.

2. To a claim under an entail, a recovery duly suffered, with the deed to lead the uses of that recovery, may be pleaded; if the estate limited to the plaintiff, or under which he claims, is thereby destroyed.

Treatise up-
on Pleadings
by English
Bill, 203.

3. If the judgment of a court of ordinary jurisdiction, has finally determined the rights of the parties, the judgment may, in general, be pleaded in bar of a bill in equity: thus to a bill brought for discovery and relief, and to prevent the defendant from setting up a legal title in a trustee, as a defence to a writ of right brought by the plaintiff to try a title to certain estates mentioned in the bill, the defendant pleaded that the writ of right had been tried and determined against the plaintiff, which was held a good plea to a farther discovery.

1 Brown's
Chan. Rep.
305. Sid-
ney, styling
himself Earl
of Leicester,
v. Perry.

So where a specific legacy being left to L, he applied to the executor, who assented, but delayed to deliver it; L brought an action of trover for it, and had a verdict and 200l. damages: the executor preferred his bill in this court; and insisted, first, That an action of

trover would not lie for a legacy; and secondly, That it is a verdict against conscience, the damages being excessive. The court held, that after an executor has assented, an action of trover certainly lies for legacy; and that this was not a case where they would relieve against a verdict, and therefore allowed the plea of the verdict and judgment*: but in a case where a foreign sentence in a commissary court in

3 Atk. 215. *France* was pleaded to a bill brought in this court for the same matters as those to which the plea related, the same was over-ruled; for it was a proper case to stand for an answer, with liberty to except, and the more so, as it was a sentence in a *commissary* court only, which is of a *political* nature; but if the foreign court, pronouncing a sentence or judgment, has full jurisdiction to determine the rights of the parties, the judgment or sentence of such a court may be a proper defence, by way of plea; but, if there is any fraud charged, the judgment or sentence cannot be pleaded, unless the fraud be denied by the plea, and the plea supported by an answer to the charge of fraud.

If a bill is brought in this court to set aside a will relating to a personal estate only, and to stay the probate thereof upon a suggestion that the will was gained by fraud, the defendant may demur to the jurisdiction, because it

* 3 Atk. 224.—*Note*, In this case the court said, that as to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for a debt, &c. and the defendant after the verdict discovers a receipt for the very demand in the action; here the court would relieve, but even in this, and such like cases, the court will not always relieve against a verdict where the defendant submits to try it at law first, where he might, by a bill of discovery, have come at this fact by the plaintiff's answer upon oath, before any trial at law was had.

is apparent upon the face of the bill, that the spiritual court has the proper cognizance of wills relating to personal estates, and can determine fraud concerning them, and that therefore such a bill is improper in this court: but where the fraud practised has not gone to the whole of the bill, but only to some particular clause; or if the fraud has been practised to obtain the consent of the next of kin to the probate; the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin *.

1 P. Will.
389.
2 P. Will.
287.
Kerrick v.
Bianby,
3 Brown's
Parl. Caf.
358.

Bennet v. Vale, 2 Atk 324. Bouchier v. Taylor, 7 Brown's Parl. Caf. 414.
2 Vern. 8, 76.; but with respect to the limits of the jurisdiction of a court of equity in testamentary matters, vide Sheffield v. Duchess of Buckinghamshire,
1 Atk. 628. Barnsley v. Powell, 1 Vefey 119. 284.

* Treatise upon Pleadings by English Bill, 206.

Where a bill was brought by a member of *Gray's Inn*, against the treasurer, benchers, and steward of the inn, for an account of the monies paid for the renewal of grants of chambers, and that the society might be decreed to renew the plaintiff's term in several sets of chambers, the defendants pleaded that *Gray's Inn* was a voluntary society, governed by benchers, who make rules for the regulation of the society, and the letting of chambers, &c. *Subject to an appeal*, in case of disputes, to the *Lord Chancellor and the twelve Judges*; and the plea was allowed.

2 Brown's
Chan. Rep.
241. Cun-
ningham v.
Wegg and
others.
Vide also
1 Keb. 135.
2 Will. 511.
Hart's case,
Douglas
340.

III. Under the third branch of pleas in bar, of matters in *pais*, may be ranked,

1. A stated account; 2. an award; 3. a release; 4. a will or conveyance; 5. a purchase for valuable consideration; 6. a plea of any statute which may be a bar to the plaintiff's demand, as the statute of frauds and

A a 3

perjuries,

perjuries, or the statutes for limitation of actions may be considered as a plea of matter in *pais*.

1. A plea of a stated account is a good bar to a bill for an account; for there is no rule more strictly adhered to in this court, than, that when the defendant sets forth a stated account, he shall not be obliged to go upon a general one, because very often a stated account would unravel a perplexed affair, which might otherwise be left in the dark, if left to a general one; and therefore where there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend.

2 Atk. 1.

If fraud be objected to the stated account, and to the stating of it, and all the circumstances of fraud answered and denied, the plea of such account is a good one, for that is not *exceptio ejusdem rei cujus petitur dissolutio*; for that which should destroy the stated account is the fraud, and that is denied, and therefore such stated account stands proper to be pleaded against any unliquidated demand; for otherwise no man would be safe in stating his account, and delivering up his vouchers, touching the particulars; and therefore the plaintiff who has the vouchers delivered up to him, which always ought to be part of the plea, ought to assign error in the account, which it is supposed he is able to do, having the vouchers in his hands, whereby to make out such

Gillb. Chan. error.

57.

The delivering up vouchers is an affirmation that the account between the parties was a stated one; but to make it so, it is not absolutely necessary that they should be delivered up at the time the account is settled; for instance,
in

in the case of bankers and their customers, it is seldom done, but the draughts which are made upon them, are constantly kept on files, because they are vouchers, and of use in clearing up disputes between their shop and a third person. 2 Atk. 252.

And where persons have mutual dealings, signing the account is not absolutely necessary to make it a stated account; for instance, where there are transactions between a merchant in *England* and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards; but it is necessary Ibid. 252. that the defendant in pleading a stated account should shew it was in writing, and likewise the balance in writing, or at least set forth what the balance was. Ibid. 399.

Where a bill is brought to impeach an account, and the defendant pleads *a stated account*, it is not necessary in every case that the account should be annexed by way of schedule to the answer, for the plea is sufficient in case it be a fair account between the parties; but if the bill not only impeaches the account, but charges the plaintiff, has no counterpart of the account, the account should be annexed by way of schedule to the answer; that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out.

Ibid. 392.

A bill was brought for an account; to which the defendant put in a plea of a stated account

as to all matters herein *before accounted for*; and this plea was held to be bad, because the defendant, as to any errors charged in the account, might by such a plea effectually defend himself against the discovery of any error, by saying only it was *before accounted for*; he must aver that the stated account is just and true, to the best of his knowledge and belief, if neither error nor fraud is charged; but if error or fraud are charged, they must be denied by the plea as well as the answer.

3 Atk. 70.

Gilb. Chan.
56.

If one merchant sends an account-current to another in a different country, on which a balance is made due to himself; the other keeps it by him about two years without making objections to it; the rule of this court and of merchants is, that it is considered as a stated account.

2 Ves. 239.

2. A plea of an award is not only good to the merits of the case, but to the discovery; for a defendant to a bill is not obliged to set out the whole account between him and the plaintiff after an award in his favour in relation to that very account, for that is conclusive to all the parties, till an error is shewn in taking the account, or partiality and improper behaviour in the arbitrators; and if any particular error is pretended, the plaintiff ought to charge it with all its circumstances: the only ground to impeach an award is collusion, or gross misbehaviour in arbitrators, for otherwise, being made by judges of the parties own choosing, it is final, and binding upon all parties, or no person would ever accept of being arbitrator.

3 Atk. 530.

Ibid. Per
Lord Hard-
wicke.

Thus where a bill was brought to set aside an award, and the arbitrator was made a party,
and

and a discovery sought from him of the grounds and foundation upon which he made the award, and that the same might be set forth minutely in his answer ;

The arbitrator pleaded in bar to so much as seeks so particular a discovery, that he was not obliged to set forth minutely the grounds and foundation upon which he made his award.

Lord Chancellor: Unless there is corruption or partiality in an arbitrator, the party cannot set aside the award ; and if it should be allowed to make arbitrators defendants, and give them all this trouble to set forth the particular reasons upon which they founded their award, it would introduce very great inconveniencies, and be a discouragement to any person to undertake a reference ; if there was any palpable mistake made by an arbitrator, or miscalculation in an account that had been laid before him, the party aggrieved might bring his bill against the party in whose favour the award is made, to have it rectified, and not against the arbitrator : Plea was allowed.

3 Atk. 644.

There are many instances in this court where arbitrators charged in a bill with corruption and partiality may plead the award in bar to the discovery ; but there those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer shewing the arbitrators to have been incorrupt and impartial, or the court will give the party a remedy by making the arbitrators pay costs.

Ibid. 500.
396.

3. A release is proper to be pleaded in bar of the bill, if the plaintiff or a person under whom he claims, has released the subject of his demand ; but the defendant must set forth the valuable

Hard. 163.
Gilb. Chan.
57.

valuable considerations upon which such release was made, otherwise fraud will be presumed; and where a release is pleaded to a bill for an account, it must always be under seal, otherwise it is to be pleaded as a stated account only.

4. The plea of a will made in favour of the defendant, and that it was duly executed, has been held good in the case of a bill brought to set aside the will upon the ground of fraud; as where it was suggested, that the testator was incapable of making a will by being perpetually in liquor, and particularly when he executed the will: the defendant pleaded the will was duly executed, and that it ought to prevail till upon an issue at law it should be found to be otherwise; and the plea was allowed.

3 Atk. 17.
but vide
2 Ves. 361,
362.

But the same bill having also prayed that a receiver might be appointed, the court said, that as to so much of the plea as extended to that part of the bill, it must be disallowed; for the hands of the court should not be tied up, if, in the progress of the cause, it should be necessary to appoint a receiver.

Pract. Reg.
279, 280.

In a bill for a discovery of title, the defendant may plead that the complainant has conveyed the premises in question, or his right to them, to another person, or he may plead a conveyance from the ancestor to himself.

5. A purchase, or mortgage, for a valuable consideration without notice of the plaintiff's title is a good plea, in bar of a bill brought to be let into the possession of an estate; but the plea must aver that the vendor was seized in fee, or that the defendant believes and is advised, that he was so at the time of the purchase; for

for if it be charged in the bill, that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, the defendant cannot cover such discovery, unless he swears a seizin in fee in the vendor, or to his belief of such seizin at the time of the purchase, or that such fines and recoveries were levied and suffered, as would bar an entail, supposing the vendor was only tenant in tail; for if the defendant (the purchaser) should set forth a purchase by lease and release, that would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail, and there is no bar in that case against the issue.

Gillb. Chan.
57, 58.

It is incumbent also upon the party relying upon this plea to set forth the purchase money, for if he is not a purchaser for valuable consideration, but is only a volunteer, that is no bar to the discovery: also the deeds of purchase setting forth the dates, parties and contents briefly, and the time of their execution must be set forth; notice must also be denied in the plea, otherwise it is not a complete equitable bar; for if he had notice of the plaintiff's title, though the defendant paid a full value for his purchase, he is not a conscionable purchaser; notice of the plaintiff's title must also be denied in the answer, for that is matter of fraud and cannot be covered by the plea, but it must be denied by the plea, otherwise, there is not a complete plea in court on which the plaintiff may take issue. Ibid. 58.

It is not sufficient to deny notice of the plaintiff's title at the time of the execution of the deed, or payment of the consideration money, but the defendant must swear he had no notice either at or before the execution of the deeds, or
at

2 Atk. 397.
630.

Ibid. 630.
3 P. Will.
281.

at or before the payment of money: but it is sufficient to aver, that the person who conveyed or mortgaged, was seized or pretended to be seized, when he executed the purchase or mortgage deeds; *secus*, where a purchaser sets up a fine and non-claim as a bar, he must aver that the vendor was actually seized.

It was said by Lord Chancellor *Hardwicke*, that a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person who *bought without notice*, shall shelter himself under the first purchase, but it must be the very same interest in every respect; but a man cannot defend himself in this court as a purchaser for a valuable consideration under articles only; for if he is injured, he must sue at law upon the covenants in the articles.

2 Atk. 571.

A bill was brought to be let into the possession of an estate, the defendant pleaded a purchase for a valuable consideration, and that the money was paid, or is *bona fide secured to be paid*; but the fact was, that the consideration money was never paid, but only secured to be paid.

Lord Chancellor: The defendant has not paid the money yet; and therefore, as he has notice now of the plaintiff's title, and the money he has secured to be paid, may never be paid,

3 Atk. 303. consequently the plea must be over-ruled.

A. devises the estate in question to B in tail, remainder to C in fee, and a bill was brought by the heir of the body of B, for deeds and writings in possession of the defendant:—the defendant pleaded he is a purchaser for valuable consideration from C, and had no notice of the plaintiff's title; but the plea was over-ruled upon the ground, that where a defendant claims under a conveyance in which there is an estate
tail

tail prior to the estate under which he purchased, it is incumbent upon him to see if that estate is spent; so where the bill charges particular and special instances of notice of the plaintiff's title on the defendant, his denial of notice generally is not sufficient, but the notice must be denied as specially and particularly as it is charged. 1 Atk. 522.

3 Atk. 815.

It is a constant, invariable rule of the court, that any mortgagee may protect himself from a discovery of his title deed, if he denies notice of the plaintiff's title; so an assignee of a mortgagee, from persons not having notice of mortgagor's being only tenant for life, is not bound to discover whether he himself had notice, as he had a right to avail himself of the mortgagee's want of notice. 2 Ves. 450.

2 Brown's
Chan. Rep.
66.

Notice and fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice, or of fraud will not be in issue*; but where a defendant in his plea of a purchase for a valuable consideration, omits to deny notice, if the plaintiff replies to it, all the defendant has to do, is to prove his purchase; and it is not material if the plaintiff proves notice, for it was the plaintiff's own fault, that he did not set down the plea to be argued, in which case it would have been over-ruled †. * Vide Treatise upon Pleadings by English Bill, 216. where the reader will find three very late cases to this effect determined by Lord Chancellor Thurlow stated at large.

In a bill against a jointress to discover her title, by the heir at law to the person who made the jointure, and no appearance of any settlement, the court will upon the plaintiff's offer to confirm the jointure oblige a production of the deed; without such offer, the settlement is a good plea in bar, but it must be set forth with sufficient certainty; so a plea of bare title only without setting forth a valuable consideration will † 3 P. Will. 94.

2 Ves. 450.

will not protect a defendant from giving an answer to the title set up by the bill.

Notice to the agent is notice to the party; as where A makes three several mortgages to B, C, and D, and in the last mortgage B is a party, and agrees that after he is paid he will stand a trustee for D, it was decreed that C shall be paid before D, for all the securities being transacted by the scrivener, notice to him was notice to D.

So where A having notice of an incumbrance, purchases in the name of B, and then agrees that B shall be the purchaser, and he accordingly pays the purchase money without notice of the incumbrance: tho' B did not employ A, nor knew any thing of the purchase till after it was made; yet B approving of it afterwards made A his agent *ab initio*, and therefore shall be affected with the notice to A: so notice to a man's counsel is notice to the party; but where a counsel comes to have notice of the title in another affair, which it may be, he has forgot, when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party.

With actual notice you may affect any one by an original bill; but as to notice purely by a *lis pendens*, you shall not affect any one who is no party to the suit by an original bill; unless the former cause has proceeded to a decree; for if the first suit be proceeded in with effect, all persons that come in *pendente lite*, though they be no parties to the suit, their interest shall be bound, and avoided by the decree in that cause; but in the case of *Worley v. Lord Scarborough*, Lord Hardwicke Chancellor said, that a decree is not to be looked upon as a general notice,

Ibid. 609.

¹ Vern. 287.

Vide also
Lowther
and Charl-
ton in Chan.
Hil. 15 Geo.

². 1741.

(Lib. R.
139)

Ibid.

Vide also

³ Will. 117.

notice, and that there is no such doctrine, that men are to take notice of the decrees of this court, though they are to take notice of a *lis pendens*.

A bill was brought to prove a will, and perpetuate the testimony of the witnesses: the defendant pleaded himself a purchaser without notice of any such will, and insisted that unless there had been a verdict in affirmance of such will, (nothing hindering the plaintiff, but that if he had a title he might recover at law,) the plaintiff ought not to be admitted to examine his witnesses, thereby to bring a cloud over a purchaser's estate; and the court allowed the plea.

1 Vern. 354.

6. The statute of frauds and perjuries has been pleaded to a bill brought for the specific performance of an agreement with an averment, that there was no agreement in writing signed by the defendant, nor any person by him lawfully authorized, in a case where the defendant had altered a draught with his own hand, for the purchasing by him of an estate, and though the seller afterwards executed the conveyance and caused it to be registered; but this was held not to be such a signing on the part of the defendant, as to take it out of the statute.

29 Car. 2.
c. 3.

1 P. Will.
770.
Hawkins v.
Holmes.

In the argument of this case the Lord Chancellor (Lord *Macclesfield*) said that unless in some particular cases where there has been an execution of the contract by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for the completing of it; and to put a different construction upon the act would be to repeal it.

So where a bill was filed for the specific performance of an agreement, for the renewal of a lease

a lease of a house from *Moore* and his wife to *Stokes*; there had been some difficulty about the terms of the renewal, but at length (as the bill charged) they came to an agreement, and the defendant *Moore* being called upon by the plaintiff to prepare the lease, *Moore* named a Mr. *S.* for that purpose, and wrote certain instructions from whence the lease was to be prepared, in these words; viz. "The lease renewed—Mr. *Stokes* to pay the King's tax, also, to pay *Moore* 24l. a year, half yearly; Mr. *Stokes* to keep the house in good tenantable repair." To this bill the defendants having pleaded the statute of frauds, and that plea having been ordered to stand for an answer with liberty to except, and the defendants having then by their answer admitted the written instructions, one question made on the hearing the cause was, whether there was a sufficient signature by *Moore* to take this out of the statute. And for the plaintiff it was insisted that *Moore* having written his own name in the body of these instructions would amount to such a signature—and that it did not signify whether the name was to be found at the body or the top, or in the body of the instrument, and it was likened to the cases upon wills, in which it had been determined, that the testator's writing his name in the introduction to the will, was a good signing within the statute.

Wellford v.
Beverly,
3 Atk. 503.

On the other side, the case of *Hawkins v. Holmes* (above cited) was relied upon. The then Lord Chief Baron, (*Skynner*,) and Mr. Baron *Eyre*, (the present chief Baron,) delivered their opinions, (and the other barons agreed,) that the signature required by the statute is to have the effect of giving authenticity to the whole

whole instrument, and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found—as in the formal introduction to a will—but it could not be imagined that a name inserted in the body of an instrument and *applicable to particular purposes*, could amount to such an authentication as the statute required—upon which (as well upon another) ground the bill was dismissed.*

So where on a marriage treaty, the intended husband and the young lady's father went to a counsellor's chambers, to have in consideration of the portion the father proposed to give, a settlement drawn; minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk to be drawn up in form: the next day the father dies, and the day following the marriage was solemnized; and the husband and wife brought a bill to compel a specific execution of the marriage agreement, and to have the portion paid; the defendant pleaded the statute of frauds and perjuries, and on arguing that plea, the benefit thereof was saved to the hearing; and upon the hearing the court held this agreement to be within the statute.

Proc. in Chan. 403—*Note*, In this case it seemed to be agreed both by the court and counsel, that if the marriage had been had upon the foot of this writing, and the father had been privy and consenting to it, that he should afterwards have been obliged to execute his part thereof. *Vid. also 1 Eq. Abridg. 21. S. S. C. 2 Chanc. Rep. 284. S. C. Gilb. Chanc. 238. Proc. in Chan. 208. 374. 380. 526. 533.*

But in a subsequent case, (where a question arose upon the statute of frauds and perjuries, whether a person *subscribing* a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of that statute,) the Lord Chancellor said:

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B b

The

* 1 P. Will. 770, 771. Mr. Cox's edition, in notes, *Whaley v. Buge- nal*, 6 Bro. P. C. 45. and several other cases upon this subject collected in *Whitbread v. Brockhurst*, Bro. Cha. Rep. 404.

Bawdes v. Amhurst,

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The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other; and therefore both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon.

The word *party* in the statute is not to be construed party as to a deed, but *person* in general; or else what would become of those decrees, where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute?

There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it.

And he denied the general doctrine as laid down in *Bawdes v. Amburst*, though true as applied to that case by Lord Cowper, and said the difference between the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties; but *here* the defendant signed it as a complete agreement, and as she knew the contents, is to be bound by it in the present case.

Proc. in
Chan.

Welford v.
Beazely,
3 Atk. 503.

Thus where the plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing; however in confidence of the agreement, the plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate; some time after the defendant

sent

sent a letter to the plaintiff informing him, that at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate, unless he would give him a larger price: the bill was brought to carry the agreement into execution, to which the statute of frauds was pleaded.

The Lord Chancellor allowed the plea, and observed the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned: as to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement, or does any act of the like nature, the court will decree an execution of it; but the circumstances only of giving directions for conveyances, and going to take a view of the estate, he thought not sufficient.

1 Atk. 13.
Note, with

respect to supplying or explaining written agreements by parol evidence, *vid.* Blackstone's Rep. p. 1250. *Preston v. Mercieu*, where that learned author says, "Courts should be very cautious in admitting any evidence to supply or explain written agreements, else the statute of frauds would be eluded: and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It ought never to be suffered, so as to contradict or explain away an explicit agreement, for that is in effect to vary it."

In a late case it was conceived that courts of equity, in determining cases arising upon this statute, had laid down two propositions founded on rules of equity, and have given a construction to the act accordingly, which amounted to this; that the act was to be construed, as if there had been an express exception, to the extent of those rules, in favour of courts of equity, and that no action was to be sustained, except upon an agreement in writing signed according to the requisition of the statute; and

B b 2

except

Whitchurch
v. Beavis, in
Chancery,
8th February
1786.

Treatise
upon Plead-

ings by English Bill, 215. where also it is said in a note, that application has been since made to have the plea in *Whitchurch v. Beavis* re-argued, and the point therefore is not finally decided.

1 Brown,
Chan. Rep.
404. *Whit-*
bread v.
Brockhurst.

21. Jac. 1.
c. 16.

Gillb. Chan.
61.

3 P. Will.
143. *South*
Sea Compa-
ny v.
Wymond-
fall.

1 Vern. 135.

except upon bills in equity, where the party to be charged confessed the agreement by answer, or there was a part performance of the agreement. It was therefore determined, that to the fact of the agreement the defendant must answer. In all these cases if any matter is charged by the bill, which may avoid the bar created by the statute, that matter must be denied generally by way of averment in the plea; and it must be denied, particularly and precisely, by way of answer to support the plea.

To a bill brought for the specific performance of an agreement for the sale of an estate, the defendant pleaded the statute of frauds; first, that there was no agreement in writing; secondly, that there was no part performance of such agreement; this was held to be a double plea, and ordered to stand for an answer with liberty to except.

7. In pleading the statute of limitations, the defendant, in his answer, must say, that he has paid his money; because otherwise a court of equity supposes a trust between the plaintiff and defendant, and that the money is a deposit in the hands of the defendant for the benefit of the plaintiff, and the statute of limitations does not reach trusts; so this statute is no plea where the bill charges a fraud; but then it should be charged by the bill that the fraud was discovered within six years before the bill filed; and if there be any fraud charged in the bill, it must be denied by way of answer, and not by way of plea.

If an executor, administrator or trustee for an infant, neglects to sue within six years, the statute

of limitations shall bind the infant; and a corporation shall have the benefit of this statute as well as any private person; the statute of limitations cannot be pleaded to the discovery when the debt was due, though it may to the debt itself; because by the defendant's setting forth when the debt commenced, it will appear to the court whether the six years are incurred according to the statute. ^{3 P. Will. 309, 310.}

2 Atk. 51.

In the case of the *South Sea Company*, in whom the estates of the late directors are vested by act of parliament, where the statute of limitations might have been pleaded against the late directors; it is pleadable against the Company, who stand but in such directors place; so where, though the assignee of the effects of a bankrupt claims under the act of parliament, yet as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignee; but the statute is *no* good plea where the estate in law is in trustees. ^{3 Will. Rep. 144.}

9 Mod. 32.

To a bill brought by a creditor of an intestate for 100 l. due on a note, charging that the administratrix promised to pay it as soon as she could get in effects; the administratrix pleaded the statute of limitations, and that she made no promise to pay the note.

Lord Chancellor: As there is a particular and special promise charged, the plea here is too general; the defendant should have pleaded that she made no promise to pay out of the assets, and therefore it must stand for an answer with liberty to except.

3 Atk. 70, 71.

If the principal is barred, the interest is so likewise.

B b 3

Where

Where a note is given for the payment of an annuity of 6 l. *per annum* during the life of the annuitant, the defendant pleading that he did not promise to pay within six years, is bad, he should have pleaded the cause of action hath not accrued within the six years: so where a note is given for payment of money three years from the date, and an action brought, a plea that the defendant has not promised to pay is bad, because it is executory, and therefore it should have been that the cause of action hath not accrued; so where a note is given to pay 100 l. by instalments, that defendant hath not promised to pay is bad, because the statute of limitations bars only what was actually due six years before the action brought.

3 Atk. 71.

To a bill which was brought for discovery of the defendant's title, charging fraud in the defendant, and praying to be let into possession of the estate, the defendant pleaded the statute of limitations both to the discovery and relief.

Lord Chancellor: I am of opinion the defendant cannot plead the statute of limitations to the discovery, but must answer to the fraud; and that, as the defendant has pleaded it, it is in the nature of a demurrer, for the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own shewing, if I was to allow the plea, the plaintiff could not take exceptions to the answer; and therefore over-ruled the plea.

Ibid. 558.

A bill was brought to redeem a mortgage, after the mortgagee had been in possession of the mortgaged premises at least thirty years; the

the defendant pleaded the statute of limitations in bar, and by his plea insisted upon the length of time he and the person under whom he claimed had enjoyed the estate, and been in quiet possession for such a number of years; the Lord Chancellor at first doubted whether the defendant could in this case plead the statute of limitations, for insisting on the length of time against a bill to redeem, is only a kind of equitable bar, and taken by way of *analogy* to the statute; and the rule being for a defendant to insist by his answer, and not by plea, upon the length of time; but precedents being ordered to be searched for, upon a review of the same, the plea was allowed. It was said, that Lord Chancellor *King* in a case of this kind, allowed a demurrer*; but Lord *Hardwicke* said, he was of a different opinion, and should have over-ruled it, because, if allowed, the bill would be out of court, and that is carrying it too far †.

1 Chan. Caf.
102.
Pearson v.
Pulley.
Jenner v.
Cray, the
26th May
1731. Chan.
Rep. 110.
Clapham
v. Boyer.
1 Vern. 418.
St. John v.
Turner.

Ryley v. Harveft. January 16th 1730. Trevor v. Floyd, in the Exchequer before Lord Chief Baron Pengally.

† 3 Atk. 226, 227: Aggas v. Pickerell.

On a bill in equity being abated by death, if the executor or administrator of the party deceased do not revive within six years, the statute of limitations is a good plea in bar to a

* 3 P. Will. 287. note. B. Jenner v. Tracey, Paschæ 1731, by Lord King, on a demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above twenty years, the court held the defendant need not plead the length of time, but might demur; and that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, &c.; that there did not seem to be any certain time when the length of possession of the mortgagee should bar the mortgagor's right of redemption; but as twenty years would bar an entry or ejectment, abstracted from the excuses abovementioned, there was the same reason for allowing it to bar a redemption. The same rule was observed in the case of Belch v. Harvey, Michaelmas 1736, by the Lord Talbot.

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† 3 Atk. 226, 227. Aggas v. Pickerell.

On a bill in equity being abated by death, if the executor or administrator of the party deceased do not revive within six years, the statute of limitations is a good plea in bar to a

* 3 P. Will. 287. note, B. Jenner v. Tracey, Paschæ 1731, by Lord King, on a demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above twenty years, the court held the defendant need not plead the length of time, but might demur; and that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, &c.; that there did not seem to be any certain time when the length of possession of the mortgagee should bar the mortgagor's right of redemption; but as twenty years would bar an entry or ejectment, abstracted from the excuses abovementioned, there was the same reason for allowing it to bar a redemption. The same rule was observed in the case of Belch v. Harvey, Michaelmas 1736, by the Lord Talbot.

bill brought by them after; but in case there has been a decree to account, the statute has been held to be no plea; for a bill of revivor, *after a decree to account*, is in nature of a *sci. fa.* and not within or barable by the statute of limitations; though the demand may be a very stale one, and not to be countenanced.

1 P. Will.
744, 745.

Plenary for six months before the bill was filed, has been held to be a good plea in bar to a bill brought on an equitable title to presentation to living, seeking to compel the defendant to resign; for the statute of *Westminster 2.* * being intended to secure the peace of the church, must be considered for that purpose, as a statute of limitation, and as a bar of an equitable, as well as a legal title.

3 Atk. 458,
459 Vid.
also 2 P.
Will. 404,
405. where
the bill was
brought a-
gainst a

mortgagee and his presentee seven months after institution, the Lord King dismissed the bill, declaring that as a *quare impedit* was confined to the six months after the death of the last incumbent, to the bill seeking the defendant to resign, and consequently to deprive him of his living, ought by the like reason to be limited to the same time, in regard it tended to the peace of the church.

* 13 Edw. 1. c. 5.

Note, Where the defendant insists upon the benefit of this statute by way of answer, he shall at the hearing have the benefit of the statute, in the same manner as if he had pleaded it.

2 P. Will.
145.

The statute of limitations cannot be pleaded against a breach of trust, nor can a person who has taken a conveyance from the trustee shelter himself under a plea of that statute.

3 Atk. 459.

The several kinds of pleas hitherto considered being such, as in their operation, and the effect produced by them respectively, extend only to the relief prayed by the bill, and likewise to the discovery prayed, wherever it is merely sought for the purpose of obtaining relief; it remains therefore to treat of the several

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ral kinds and descriptions of pleas which may be relied upon in defence to a bill, the object of which is a discovery only from the defendant.

The grounds upon which pleas of this description are commonly founded, are various : as,

1. Where a bill is brought against a person who has no interest in the subject to intitle the plaintiff to make him a party to the suit, the defendant ought to plead to such bill, and support his plea by an answer disclaiming interest; for a demurrer will not protect him from a discovery, because a demurrer must admit every thing well charged in the bill to be true; and it cannot be supported by an answer as to the matters demurred to, because that is 'bringing into it something said on the part of the defendant to support an allegation, that the charges in the bill are not sufficient.

1 Ves. 427.

Thus where a bill was brought by an heir at law to discover the circumstances of the execution of a will against the subscribing witnesses; one of whom demurred to the bill; it was said by the court that you cannot make one defendant to a bill who is merely a witness, in order to have a discovery by his answer of that, which he may be properly required to discover, if called upon as a witness; but as against a party interested, the plaintiff is intitled to have a discovery from him, if he is charged to be concerned in the fraud in obtaining the will; and it is not his being made a witness, that will prevent this discovery: but the defendant seemed to have mistaken his way, and should have pleaded instead of demurring; for here there is an express charge that

Which is
necessary for
plaintiff to
shew in de-
fendant in a
bill for a
discovery
merely.

2 Vern. 380. 2 Atk. 394. 3 Will. 311. * 1 Ves. 426, 427.

that the defendants pretend to some right or interest under the will; if he had pleaded to these matters, and supported that by an answer, denying the claim of any such interest, it had been a good plea: the demurrer was for these reasons therefore over-ruled*.

2. The situation of a defendant may render it improper for a court of equity to compel a discovery, and that for many reasons which he may have to alledge against it. In the first place, the general rule is, that no one is bound to answer, so as to subject himself to punishment, by whatever law that punishment arises, or whatever is the nature of the punishment; and therefore if a bill requires an answer, which may subject the defendant to any pains or penalties, or tend to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill, or so much thereof as the plea will cover.

Treatise up-
on Pleadings
by English
Bill. 224.
Vid. also 2
Ves. 245.

Thus where a bill was brought for discovery from the defendant (who had purchased the lands mentioned in the bill), whether the person of whom he purchased was not a person professing the popish religion before he conveyed the estates in question to the defendant; the defendant pleaded the statute of 11th and 12th of *Will. 3.* for preventing the growth of popery; and the plea, as far as it went to the discovery whether this person was a papist, was allowed; so the plea of the statute of 32 *Hen. 8.* (which subjects to a certain forfeiture those who contract

* Atk. 528.

contract for the pretended rights of others), was allowed to a bill brought for discovery of a contract made, or supposed to be made, by the defendant for becoming the purchaser of which the supposed seller was not in possession; so to a bill brought for discovery of a marriage, where the fact, if true, would have subjected the party to punishment in the ecclesiastical court for incest, the defendant pleaded matter to shew, that the marriage, if real, was incestuous, and would subject the party to pains and penalties.

³ P. Will.
376.

So where an insurer by his bill suggested the ship was lost fraudulently, and in the charging part states, that instead of proper goods, there was only wool on board; and in the interrogatory part of the bill, he prays that the defendant may set out what kind of goods he had on board; the defendant pleaded several statutes that make it penal to export wool in bar to a discovery of all kinds of goods on board, and the plea was allowed, because no goods, but *wool*, was mentioned in the charging part of the bill *: But where the discovery sought was not of a fact which could subject the defendant to any penalty, though connected with another fact which might; as where the question was, whether the defendant had a legitimate son; the defendant was compelled to answer; for the discovery of that fact would not subject him to a penalty, though the discovery of his marriage with the mother of the son might, and therefore he was not compelled to discover the marriage.

² Vef. 243.

² Vef. 493.

* 1 Atk. 53. It was agreed by the court that if other kind of goods in the charging part, the defendant might have been obliged perhaps to have given some answer to it, but as there was not, the defendant was not obliged to answer the interrogatory part. So that a plea may be bad in part, and yet not so in the whole; see Lord Hardwicke, *ibid*.

So

So in a case where the defendant pleaded to a particular fact in the bill, (*viz.*) whether defendant was tenant for life; because a discovery of it would subject him to a forfeiture, he having made a lease for the life of another, which would be a discontinuance of any remainder over, who might enter for that forfeiture; but this plea was over-ruled, because it did not go to a fact the discovery of which would *necessarily* create a forfeiture; for he might be tenant for life with a power to make leases: so also where a bill is brought for discovery of waste charging defendant to be tenant for life, and that he committed waste, and praying that he may set forth and discover whether he is not tenant for life; he may plead to the discovery, whether he hath committed waste or not, but not whether he is tenant for life or not.

2 Ves. 109.

So upon a bill to discover whether the defendant was an alien, and whether her child was an alien, and where born; it was held the defendant was not bound to discover whether she was herself an alien; but she was compelled to discover whether her child was an alien, and where born.

Ibid. 294.

In all cases of forfeiture, if the plaintiff alone is intitled to the benefit of the forfeiture, and waives it by his bill, the defendant will be compelled to make the discovery required; and though the plaintiff is not intitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the court will compel him to make it; as in the case of the *East India Company v. Atkins*, the question was, whether the defendant

Mosely 75.

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ant was bound to give an account of a clandestine trade; on which trade he had covenanted to make satisfaction for loss sustained thereby, and that by stated damages; and also covenanted that he would not plead or demur to any bill to be brought in equity to discover such trade: the defendant pleaded notwithstanding; and it was admitted on all hands, that if it had not been for that covenant, he would not be bound.

3. A counsel, attorney, or arbitrator, are not compellable to make a discovery of facts reposed in them as such; as where a bill was brought to discover an ancient deed of entail supposed to be in the defendant's hands, and that he had perused it, and that he had in conversation acknowledged such deed, &c. the defendant pleaded that he was a counsel with A B, and that on a reference between the parties it was agreed, that nothing which passed then, should be made use of on either side, or be disclosed: and the Lord Chancellor ordered that what the defendant knew only as counsel, or under such contract of silence, he should not be put to answer.

1 Chan. Caf.
277.
Bullstrode v.
Lechmere.

So where a bill was brought against the clerk of the Skinners Company for the production of the books of account belonging to the company, and deposited in his custody as their clerk; he pleaded that at his admission to that office, he was sworn not to shew or deliver such books without the consent of the master and wardens; and his plea was allowed.

Finch 24.

Pleas may also be relied upon in many cases in defence, as well to bills not original, as to original bills;—thus, on a bill being abated by death, the personal representative of the party

1 P. Will.
742.

party deceased is barred by the statute of limitations, if he does not revive within six years, provided there has been already in the cause no decree to account; and therefore a defendant, against whom a bill of revivor is not brought in due time, may plead the statute in bar of the bill; so if the defendant can shew any other matter why the plaintiff is not intitled to revive the suit against him, he may plead such matter, if the same is not apparent on the face of the bill; for if the objections to the bill are apparent on the face of it, he may demur.

3 P. Will.
348.

But where the defendant insisted by way of *answer*, that the plaintiff was not intitled to revive, the court ordered the proceedings to be revived; for that this ought to be shewn either by plea or demurrer; but if in such case it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree.

Ibid.

It is a constant rule, that matter which has arisen subsequent to the filing of the original bill must be the subject of a supplemental bill*; and therefore, if a bill is amended by stating a matter which has arisen subsequent to the filing of the bill, such irregularity may be taken advantage of by way of plea, or by demurrer, if the irregularity is apparent on the bill; so where a supplemental bill is brought for any new matter discovered since the hearing of a cause, before the former decree was signed and inrolled, if the defendant to such

* 1 Ark. 492. See *vid.* *Humphreys v. Humphreys*, 3 P. Will. 349. where the bill charged, by way of amendment, matters which arose after the filing of the bill, and therefore seemed a proper case for a supplemental; and though this was pleaded to the bill, 'yet the plea' was overruled, for that such matters may be charged either by way of supplemental, or amended bill.

bill is able to shew that there is no new matter discovered, he may take advantage thereof by way of plea; but in the case of a demurrer ^{2 Atk. 40.} to a bill of review upon the ground that from length of time the inrolment ought not to be opened, the same was over-ruled, and held that such matter was a proper subject for a plea; ^{2 Ves. 110.} to a bill of review for error apparent on the the decree, a demurrer may, perhaps, be the proper defence.

Nelson's Rep. 53. where a plea of the decree is said to be the proper defence to a bill of review brought for error apparent on the decree.

Sed vide
1 Vern. 392.

To a bill brought by a widow to set aside a decree of foreclosure, and to be let into redemption, the mortgagee pleaded the proceedings and decree in the former cause, by which it appeared that the present plaintiff, while *coverte*, had joined with her husband in a surrender of the copyhold estate in question, which was settled upon her in jointure, and had been foreclosed; and the plea was allowed: so if a decree is sought to be impeached upon the ground of fraud, the proper defence seems to be a plea of the decree, accompanied by a denial of the fraud.

3 P. Will.
352.
Mr Cox's
edition,
note (1).

Treatise upon
Pleadings
by English
Bill, 232.
2 P. Will.
72.

CHAP. IV.

*Of the Form of, and other incidental Matters
belonging to, Pleas in general.*

PLEAS in disability of the person, or to the jurisdiction, and pleas of any matter of record, or of matters recorded in this court, need not be upon oath; but pleas in bar of matters in *pais* are to be upon oath; and except

Ord. Chan.

117.

ibid. 13.

2 Chan Caf.

161.

cept the matter of the bar be single, and so full a bar as that the bill requires no further answer, the whole matter is generally set forth by way of answer; and then so much of it as goes in bar is relied upon by way of plea; and this is intitled, "The plea and answer of the defendant;" or the defendant may plead the matter proper in bar, and then add, by way of answer, what further is necessary as to fraud, &c. charged in the bill: and all pleas must be signed by counsel.

Ord. Chan.
117.

If the defendant's time for answering is out, and upon motion or petition, he obtains further time to answer *only*, without saying that he may be at liberty to plead, answer, or demur to the plaintiff's bill; he shall not in this case (though he may afterwards upon advising with his counsel find reason to plead or demur) put in a plea or demurrer without obtaining an order for that purpose; but if the defendant obtains an order for time to answer, he may put in a plea, if the order is not to answer *only*; so that a plea cannot be taken upon a general commission to take an answer only; but if the defendant obtain an order for a commission to plead, answer, or demur, he may take and return a plea and demurrer by such commission, or an answer and demurrer, or an answer only; but after a proclamation returned, no plea, answer, or demurrer, can be put in or returned without leave of the court, by motion made in open court.

Mosely 207.
pl. 116.

Ord. Chan.
121.

Where there are matters alledged in a bill to which the bar of the plea or demurrer reaches not, or some circumstances relating to the matter which require a particular answer, as fraud, &c. the defendant must answer upon oath as

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to those, and then so much as goes in bar is relied on by plea or demurrer, and this is intitled, "*The plea and answer of the defendant;*" or, "*The plea, answer, and demurrer of the defendant:*" and if the defendant is doubtful, whether, if he plead the matter of his defence, the plea will be allowed by the court; he may shew the whole matter by answer, and then insist and rely on it, almost as if he had pleaded it; only he is not to call it his plea, nor is he to have the benefit thereof till the hearing.

Where the plaintiff apprehends the plea to be good, though not true, he may reply to the plea, and take issue upon it, and proceed to examine witnesses as in the case of an answer; and in this case, where he replies to a plea before it comes to be argued, it is always an admission of the plea, as if it had been argued and allowed, only the defendant is put to the proof thereof, and so he may, when it is argued and allowed; and if he proves his plea, the bill must be dismissed on the hearing: so if the plaintiff amends his bill before he argues the plea, it is an admission of the goodness of the plea, as if the same had been allowed on argument.

The defendant who pleads ought to be careful in the caption thereof; for if the commissioners return, "*This answer was taken,*" without the words, "*The answer and plea of the defendant was duly taken, and the defendant was sworn thereto upon his corporal oath, upon the holy Evangelists, &c.*" the plea will be rejected, because it doth not thereby appear that the party was ever sworn to the plea; but the court oftentimes indulges the party to amend the caption, looking on it rather as a mistake

2 Chan. Caf.
208.

of the commissioners, than a fault of the defendant.

Mosely 40.
pl. 22.

Vide also

2 Atk. 632.

3 Atk. 70.

4 Vin. Abr

442. pl. 1.

A defendant may plead to part of a bill, and answer to the other part; or he may plead as to part, demur to another part, and answer to the residue; but he cannot demur and plead to the same part of the bill, for the plea overrules the demurrer; and to plead to such part of the bill as is not answered, is a bad form of pleading, because it puts the court to the trouble of seeing what is, and what is not answered, and deprives the plaintiff of the benefit of taking exceptions to the answer; so it is a rule in equity, that the answer overrules the plea, where the defendant answers to the same thing he insists upon by his plea; for he ought not to make any answer to it.

Either side may set down the plea to be argued; and this is done by engrossing and leaving a proper petition with the Lord Chancellor's secretary, to whom 10 s. is to be paid when it is taken away and answered: when answered, the petition is taken to the register-office to draw up the order, which is to be passed and entered at the same office, and 1 s. paid for setting down the plea, and a copy of the order must be served, two days before the hearing, upon the adverse clerk in court.

The plea being set down for argument, both sides prepare briefs; and if, on arguing the plea, the same is allowed, the plaintiff is to pay 5 l. costs to the defendant, to be recovered by *subpoena*, &c.; but if the same is overruled, or ordered to stand for an answer without liberty to except, then the defendant pays 5 l. costs to the plaintiff: but where the words are, "*To save the benefit of the plea till hearing,*"

no other use, it is presumed, could ever be made of, or found by these words, but that they save the defendant costs for over-ruling his plea: and this seems to be, where it is doubtful to the court whether there be not some equity against the matter pleaded, and therefore the court makes frequent use of these words: but where the plea is very faulty or naught, though the court often saves the benefit thereof till hearing, yet they declare it shall not save costs.

After a plea put in there can be no motion for an injunction till the plea is argued; but the court, at the instance of the plaintiff, will speed the arguing the plea, and will give leave, that if the plea should be over-ruled, that then the plaintiff may move at the same time for an injunction.

3 P. Will.
396.

Where a testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo*, for the former cannot be argued.

Cas. in Eq.
Temp. Tal.
but 3.

Where there is a plea which covers too much, it may stand for part, and be over-ruled for part; and no exception can be taken to an answer whilst a plea is depending, for that must first be removed out of the way; but where a defendant pleads to certain facts which by his answer he admits, such plea is bad; as, where the plaintiff, whilst a papist, assigned an advowson to the defendant for the term of ninety-nine years; and having conformed, brought his bill for a re-assignment of the term, suggesting he had only assigned it in trust for himself; and to avoid the penalties of the statute of 3 Jac. and 1 Will. and Mary *, the defendant pleaded the statute of frauds and

2 Atk. 284.
Ibid. 390.

* C. 4. sec. 1,
&c.—C. 26.
which vest
the livings
in the gift
of papists
in the two
universities.

perjuries in bar to the discovery, but by his answer admitted that the advowson was assigned to him for the purposes charged in the bill; Lord *Hardwicke* held the plea must be overruled, being coupled with an answer which admits the facts *: but if the defendant pleads any thing in bar which by presumption admits the demand, and the plea is held to be bad; yet a court of equity will see whether a plaintiff has

3 Atk. 499.

Ibid. 558.

Ibid. 70.

Gilb. Chan.
58.

A defendant cannot in his plea rest upon facts of the plaintiff's own shewing, for that would be rather to demur, than plead to the bill; but he ought to aver facts to which the plaintiff may have an opportunity of replying; though in a plea of a stated account an averment by the defendant, that it is just and true, to the best of his the defendant's knowledge and belief, has been held to be sufficient: if the defendant answers to any thing to which he may plead, he thereby over-rules his plea; for a plea is only why he should not answer, so that if he answers, his plea is waived; but he is at liberty to answer any thing which is not charged in the bill in aid of his plea, as he may notice in his answer, which he denies in his plea, because that is not putting any thing in issue, which he could cover by his plea from being put in issue; but it is adding by way of answer, that which will support his plea, and not an answer to a charge in the bill, which by his plea he would decline.

* 2 Atk. 156.—*Note*, Lord *Hardwicke* was inclined to think, if the defendant had demurred to this part of the bill, it might have been a different consideration, and that such a fraudulent conveyance would, at the hearing, have been made absolute against the grantor.

In a plea it is proper to bring in facts and averments to support the plea, for averments are necessary to exclude intendments which would be made against the pleader, for the court will always intend the matters charged against the pleader to be true, unless the same are fully denied; for in pleading, the traverse is material ² Ves. 245. and issuable, and in every traverse there ought to be a proper inducement to shew the matter in traverse is material, and to be such, as if true, will defeat the title of the other party, otherwise it amounts but to a negative pregnant; and if issue is taken upon the plea, the defendant must prove the facts it suggests; and if he fails to prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct the defendant to be examined on interrogatories to supply the defect: but if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good either in form or substance, as if a defendant in a plea of a purchase for a valuable consideration, omitted to deny notice, and the plaintiff replied to it, it was held that all the defendant had to do was to prove his purchase; and it was not material whether the plaintiff proved notice; and therefore as the fact of the notice was not in issue, the plaintiff, if he proved his purchase, proved sufficient, and was intitled to have the bill dismissed; for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been over-ruled. ³ P. Will. 95.

Where a defendant pleads a decree of dismissal of a former cause, for the same matters

in bar of the plaintiff's demand on his new bill, the plaintiff may, if he pleases, apply to the court for a reference to a master to state whether there is such a decree; but if he does not make such application, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the court will determine it; if a matter of record, or not of record, be pleaded, and the plaintiff desires the opinion of the court, whether, if it be true, it be a sufficient bar, it must be argued; and if it be adjudged sufficient, and the plaintiff takes issue upon it, the defendant must proceed to prove the truth of his plea by depositions or other proofs, as in the case of an answer; and if a plea requires an answer to support it, upon argument of the plea, the answer may be read to counterpoise the plea; and if the plea cannot be supported, it will be over-ruled, or ordered to stand for an answer; and where a plea is ordered to stand for an answer, costs are seldom given on either side, and the benefit of the matter pleaded is generally saved to the hearing.

1 Atk. 53.

Pract. Reg.
282.

3 Atk. 304.

Pract. Reg.
283.

If the defendant does not petition to set down the plea to be argued, the plaintiff may petition, and obtain an order from the Lord Chancellor for that purpose; and all pleas in general ought to be entered with the register within four days after the filing of the plea; but if a defendant does not enter his plea within four days after filing, it is over-ruled of course; and the plaintiff, on the register's certificate of its not being entered, may take out a *subpœna* for costs, as of over-ruling a plea; and another *subpœna* against the defendant for making a better answer; and the same shall not afterwards be

be admitted to be set down or debated, unless upon motion it shall be ordered by the court; and no plea is to be set down for hearing on any certain day, except the order be brought to the register to enter two days at least before; and after the paper of pleas is set up in the register's office, no alteration is to be made in it. Ord. Chanc. 62.

With respect to any amendment of a plea (though certainly there have been cases in which the court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient), yet the court always expects to be told precisely, what the amendment is to be, and how the slip happened, before they allow the amendment to take place. Newman v. Wallis and another, 2 Brown's Chan. Rep. 147.

One plea only is to be admitted to the jurisdiction; wherefore if the defendant plead such plea as is not sufficient in its nature, or plead the matter insufficiently, he will be put to answer: and as pleas to the substance and body of the matter, so pleas to the jurisdiction shall be determined in open court: so, if outlawry be pleaded, and the plea is over-ruled, no other plea shall be admitted after, but the defendant must answer. Pract. Reg. 275. Ibid.

Of Demurrers.

A DEMURRER is an allegation of the defendant, which admitting the matters of fact or some of them, alledged by the plaintiff in his bill, to be true, shews that as they are set forth by the plaintiff himself, they are insufficient for him to proceed upon, or to oblige the defendant to answer; and therefore it demands the judgment of the court, whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof: and the causes of demurrer are properly upon matter defective in the plaintiff's bill, and not from any foreign matter alledged by the defendant.

Pract. Reg.

231.

3 P. Will.

395.

Ibid.

Demurrers are of various kinds: But principally a defendant may demur, 1. for that the bill is defective for want of proper parties; 2. for want of equity; 3. that the subject of the suit is not within the jurisdiction of a court of equity; 4. that some other court of equity has the proper jurisdiction; 5. that the plaintiff is not intitled to sue by reason of some personal disability; 6. that the plaintiff has no interest in the subject, or no title to institute a suit concerning it; 7. that he has no right to call on the defendant concerning the subject of the suit; 8. that things of a distinct nature are joined in the bill against different defendants; 9. that the discovery sought by the bill may subject the defendant to some penalty or forfeiture.

1. The

1. The want of proper parties is a good cause of demurrer; for acourt of equity delights to do complete justice, and not by halves; and therefore all that are interested in the suit are to be made parties, otherwise the defendant may demur; or if he should chuse to waive his right to demur, the court will frequently not proceed to a decree; or if a decree be made, it may be reversed; but if it be not reversed, yet none but such as were parties, and those claiming under them, can be bound: Thus where A. covenants for himself and his heirs, that a jointure-house shall remain to the uses in the settlement; the jointress brings a bill against the heir for a performance, the defendant demurs, for that the executor ought to be a party: and it was resolved that though at law the creditor may sue the heir only, where the heir is expressly bound, yet as the personal estate is the natural fund to pay all debts, and that, as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity; and the demurrer was allowed: so the grantee of a rent-charge must make all the purchasers parties; ^{3 P. Will.} and if two or more have a joint interest regularly, they must all be parties; so if two or more are liable to a demand, you cannot proceed against one alone; so all executors, trustees, or their representatives, are to be made parties; though this latter rule in certain cases may be dispensed with, as where there are two executors, and one of them lives beyond sea, the executor abroad need not be made a party, if the executor here has assets in his hands: so also a bill of discovery of real assets may be brought against an heir, in order to preserve

serve a debt, without making an administrator of the personal estate a party, where it is suggested that the representation is contesting in the ecclesiastical court; so in the instance of creditors, seeking an account of the estate of their deceased debtor for payment of their demands, a few suing on behalf of the rest may substantiate the suit, and the other creditors may come in under the decree: It is also a general rule, that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree; thus a residuary legatee need not be made a party; and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party; though, with regard to making the bankrupt a party*, it seems formerly to have been held otherwise†.

*By the Master of the Rolls, De Golls v. Ward, Hil. 1732. Vid. also 3 P. Will.

311.
(Note I.)

†2 Vern. 32.

But where a husband tenant for life, under a marriage settlement remainder to his wife for life with divers remainders over, brought a bill alone for the opinion of the court, whether a certain parcel of land was not intended to be included in that settlement, it was objected at the hearing of the cause that the wife was not made a party, and the Lord Chancellor allowed the objection; for he said, if the court should be of opinion against the husband, such decree would not bind the wife, so the cause was ordered to stand over, that the wife might be made a party.

1 Atk. 291.

A demurrer for want of parties must shew, who are the proper parties; but in this species of demurrer, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument.

2 Chan. Caf. 197.

2. Where a bill is brought for any thing, for which by the known rules and orders of the court, the plaintiff can have no relief, the defendant may shew such matter for cause of demurrer; and in every instance, if the case stated is such, that admitting the whole bill to be true, it appears that the bill contains no equitable matter as sufficient ground for the interference of a court of equity, or that for some reason apparent on the face of the bill, the court ought not to give the plaintiff the relief or assistance he requires in the whole or in part, the defect thus appearing on the bill is a good cause of demurrer.

3. That the subject of the suit is not within the jurisdiction of a court of equity, and that the plaintiff's remedy is properly at law, is a good cause of demurrer; thus where the plaintiff comes into a court of equity upon a certain demand, as upon a note, or bond, or the like; in that case, if the defendant denies the note or bond, he may demur to the relief, because he is entitled to try the validity of the bond or note by a jury: so if the plaintiff comes into this court for relief upon a deed, the defendant need not answer to the deed, but may demur to the bill, unless there is an affidavit of the loss of the deed annexed to the bill, or unless the object of the bill be merely a discovery of the deed, to supersede the necessity of proof at law; but if the defendant, without taking advantage of such demurrer for want of an affidavit being annexed by the plaintiff to his bill, confesses the deed in his answer, he will not be permitted in that case to demur to the * relief: but if upon the deed there is no relief at law, as if it be upon a trust, which is only determin-

able

* Gilb. Chs.
51. vid. also
1 Vesey 345.
Walmsley v.
Child, 2 P.
Will. 541.
3 Atk. 17.
3 Atk. 132.

able in equity, there the plaintiff need not annex an affidavit to his bill of the loss of such deed, nor will a demurrer be allowed for the loss of such deed, because the plaintiff's relief is properly in equity, and a court can afford him no relief upon such deed.

So where a plaintiff can have as effectual and complete remedy in a court of law as in a court of equity, and that remedy is clear and certain, a demurrer will hold; as where a bill was brought by the executrix of an attorney, for money due from the defendant for business done by her husband as his attorney, and to be paid what shall be found due upon an account, and a delivery of a bill was stated also by the plaintiff: the defendant demurred to the relief, and for cause of demurrer shewed, the remedy was at law, and that an act of parliament had pointed out a summary way; *viz.* the statute of 3 Aik. 740. 2 Geo. 2. c. 23. sec. 22. the demurrer was allowed; so also where A brings a bill against B, to recover divers sums on an account and also 10,000l. on a stale bond of above twenty years standing; the defendant demurred as to what related to the bond, for that the plaintiff might sue at law, and the demurrer was allowed*; and this objection to a bill is not confined to cases cognizable in courts of common law; for if any other court of ordinary jurisdiction, as an ecclesiastical court, court of admiralty, or court of prize, is competent to decide upon the subject, a demurrer will equally hold, except that the

* 3 P. Will. 396. But note in this case, after the demurrer was allowed, the obligee in the bond, sued the bond at law, and obtained a verdict, after which the defendant brought his bill to be relieved against the bond as having been satisfied; and the court granted an injunction, for that there was reason to grant relief in equity, though the defendant had demurred to the bill brought on the bond.

courts of equity have in the case of tithes, and in the disposition of the effects of persons dying testate or intestate assumed a concurrent jurisdiction with the ecclesiastical courts, as far as the jurisdiction of those courts extends.

Treatise upon Pleadings by English Bill, page 114.

It has been held by Lord *Nottingham*, that one who had a judgment, and had lodged a *fiery facias* in the sheriff's hands, to which *nulla bona* was returned, might afterwards bring a bill against the defendant, or any other, to discover any of the goods or personal estate of the defendant, and by that means to affect the same; but before a court of equity will interpose, the plaintiff must first go as far as he can at law, by delivering the writ of *fiery facias*, and getting it returned; so where A obtained a judgment against B, and brought a bill against C, for a discovery of B's goods, which C had got in his hands; the defendant demurred because the plaintiff had not alledged that he had taken out execution against B, and the demurrer was allowed *; so also where a judgment creditor (who had not taken out execution) brought a bill against the defendant, (who was a mortgagee of a leasehold estate, and likewise a bond creditor,) to redeem him, but for want of execution being taken out, the bill was dismissed †.

1 P. Will. 445. Note, it is sufficient for the plaintiff to shew that he has taken out execution, but it is not necessary for the plaintiff to procure a return to the writ. *Manningham v. Lord Bollingbroke*, *Eligit*, Easter 1777, in 1 Vern. 399.

Chancery. Treatise upon Pleadings by English Bill, 115. Angel and Draper. † 3 Atk. 200.

It has been already observed at large, that a court of equity will relieve in a great variety of instances wherein the policy adopted by the courts of common law, or the strict rules observed in their proceedings, admit of no legal remedy, or at most of an incomplete one; but in all these, as well as the various other cases,

(not immediately cognizable, but under particular circumstances,) relievable in a court of equity, it is incumbent upon the plaintiff to shew by his bill that the relief sought by it is not obtainable at law, or at least, if obtainable at law, is not adequate to the degree of injury or of loss sustained by him; for if he does not shew a sufficient ground for the necessary interference of a court of equity in his particular case, the defendant may demur for want of matter of equity in the plaintiff's case sufficient to support the jurisdiction of the court.

But in the
mayor of
York v.
Pilkington,
1 Atk 282.
the court
granted an
order to stay
proceedings,
because the
question of
right was
depending
in this
court in or-
der to deter-
mine the
right; and
therefore it
was reason-
able they
should not
proceed by
action or indictment till it was determined here.
Ab. 131.

This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, nor on an indictment, nor an information, nor a writ of prohibition: and the reason, is because a *mandamus* is not a writ remedial, but mandatory; and is vested in the King's superior court of common law to compel inferior courts to do something relative to the public; for that court has a great latitude and discretion in cases of that kind; and is not bound by such strict rules as in cases of private rights: and therefore where a bill was brought praying (among other things) an injunction, or an order in nature of an injunction, to stay proceedings, on a *mandamus* issued to compel the plaintiff (who was lord of a borough) to hold a court, and admit defendants as tenants, the defendants demurred, and the demurrer was allowed*.

* 2 Vesp. 397. 1 Eq. Cas.

Upon a supposition that there was no will, administration was applied for by the daughter of the supposed intestate; but pending a suit in the ecclesiastical court for the administration, a bill was brought in this court against the daughter and her husband, for an account of the personal estate of the deceased: to this bill
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the defendants demurred, and for a cause of demurrer, shewed the suit pending in the ecclesiastical court; but the Lord Chancellor overruled the demurrer, and said that in the case of *Potwis v. Andrews*, a bill of this nature was allowed before probate, and that determination was founded on a former case of *Japhet Crooke* in the time of Lord *Harcourt*: and the reason of these cases is, that the ecclesiastical court have no way of securing the effects in the mean time*.

Vid. 1 Vern.
106. Wright
v. Blick. 2
Vern. 49.
Dulwich

College v. Jackson. * 1 Atk. 286. Vid. also 2 Brown Chan. Rep. 121 *Morgan v. Harris*, where a demurrer nearly upon the same grounds and for the same reasons.

But where the defendants had instituted a suit in the ecclesiastical court for a church rate, to which there was a custom of something done in lieu of the rate, and that plea admitted; and a bill was brought in this court for an injunction to stop the defendant's proceedings in the ecclesiastical court, and to be relieved against the rates, and to compel a discovery from the defendant *Balguy*, of the value of the respective real and personal estates of the several inhabitants of the several parishes and places in the bill mentioned, and how the money collected by means of the said rates had been disposed of:

The defendants demurred to so much of the bill as sought to stay the proceedings in the ecclesiastical court by injunction, and also as to the discovery prayed thereby, as the matters contained in such part of the bill as they demurred to were properly cognizable in the ecclesiastical court, and if true, ought to have been insisted on there, or at common law, and was not a proper foundation for a bill in this court.

Lord Chancellor: This court will not admit a bill of discovery in aid of the jurisdiction of the

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The Practice of the

the ecclesiastical court, because they are capable of coming at that discovery themselves: if there is a suit instituted in the ecclesiastical court for a church rate, and a custom pleaded of a certain sum in lieu of the rate, or something done in the room of it, and that plea admitted, they may proceed to try that custom in the same manner as a *modus*; but if the custom is denied, it would be a proper ground for a prohibition *propter triationis defectum in curia ecclesiastica*, for the trying the custom is the province of the common law; the demurrer was allowed.

1 Atk. 289.
Dun and
others, v.
Balguy and
Coutes.

But where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right may bring a bill to be quieted in the possession, though he has not established his right at law, and it is no objection upon a demurrer to such bill that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights; bills of this nature are allowed merely to prevent multiplicity of suits by determining the rights of the parties upon issues directed by the court, instead of putting the plaintiff to sue a number of persons separately at law: Indeed, in most cases it is held, that a man shall not come into a court of equity to establish a legal right, unless he has tried his title at law if he can; but it has been said, that this is not so general an objection as always to prevail, for there have been a variety of cases both ways: thus it has been held, that a man who has been in possession of a water course sixty years, may bring a bill to be quieted in his possession, although he had not established his right at law; also a man who is in possession of a fishery

1 Atk. 182.
Mayor of
York v.
Pilkington
and others,
and the cases
there cited.

2 Atk. 484.
1 Atk. 284.

Per Lord
Hardwicke.
1 Atk. 282.

Bush v.
Western,
Prec. in
Chan. 539,
531.

a fishery may bring in a bill to examine his witnesses in *perpetuam rei memoriam*, and establish his right, though he has not recovered in affirmance of it at law; but otherwise, if he is interrupted and dispossessed, for then he has his remedy at law.

Duke of
Dorset v.
Serjeant
Gindler.

It is certain where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law, quiet that right, he may come into this court first, which is called a *bill of peace*, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant: but where a question about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law.

2 Atk. 484.
Lord Ten-
ham v.
Herbert.

A bill was brought to perpetuate the testimony of witnesses to a bond charged to be usurious, and which also alledged that the defendant *Green*, whom the plaintiff wanted to examine, was very aged and infirm: *Green*, who was only a nominee in the bond, demurred, as the bill sought to subject him to a penalty, and also as the plaintiff did not offer to pay what was really due.

Lord Chancellor: The defendants have demurred to so much of the bill as seeks any discovery, and to perpetuate the testimony: as to the first part, that it would subject the defendant to a penalty, the demurrer is proper, and if it had gone no further,

The Practice of the

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Duke of
Dorset v.
Serjeant
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Lord Chancellor: The defendants have demurred to so much of the bill as seeks any discovery, and to perpetuate the testimony: as to the first part, that it would subject the defendant to a penalty, the demurrer is proper, and if it had gone no further,

The Practice of the

ther, must have been allowed, as in such cases is usual.

But as to the other part of perpetuating the testimony, the demurrer is bad, for the plaintiff is entitled to perpetuate testimony, notwithstanding his not offering to pay; and there are no certain distinctions laid down, where a man is forbid to perpetuate testimony as to personal demands against himself: so far as this, if proved, relates to the loss of the debt, so far it may be called a penalty; but a man may bring a bill to perpetuate testimony in many cases, where a man cannot bring a bill for relief without waiving the penalty; but this bill is to perpetuate testimony to a plain effect; what the consequence of that fact is, will be another consideration; and therefore this demurrer being bad in part, must be overruled; for a demurrer bad in part is void *in toto*, and cannot, like a plea, be separated.

1 Atk. 450,
451. 1 P.
Will. 117. Proc. in Chan. 331. *Hankin v. Middleitch*, 2 *Brown's Chan. Rep.* 641.

Per Lord
Hardwicke,
1 Atk. 571.
Brady v. v.
Ord.

But it has been held that a tenant in tail out of possession cannot bring a bill to perpetuate testimony of witnesses, till he has recovered possession by ejectment, and if he does exhibit such a bill, on the defendant's demurring for this reason, the court will allow it.

4. The several inferior courts in *England* possessing equitable jurisdiction have been already enumerated, and of these it has been observed, that when those circumstances occur which give them jurisdiction, they have exclusive jurisdiction in matters of equity as well as matters of law; and when therefore it appears on the face of a bill, that another court of equity has the proper jurisdiction, the defendant may demur to the jurisdiction of the court of Chancery.

5. If

5. If the personal disability of the plaintiff to sue appears on the face of the bill, the defendant may take advantage of it by demurrer, as where a married woman exhibits a bill without her husband, an idiot or lunatic without his committee, or an infant without his next friend being named in the bill; in all these cases, being matters of defect apparent upon the face of the bill, the defendant may demur.

6. It is material that the plaintiff do shew by his bill, that he has an interest in the subject of the suit, and a title to institute a suit concerning it; for if the bill is deficient in either of these requisites, and that defect is apparent upon the face of the bill, the defendant may take advantage of it by demurrer; thus where a bill was brought by a protestant next of kin, to have an account of a rent charge settled on the defendant upon marriage, suggesting she was a papist; and on a demurrer to the relief prayed by the bill, the court said that it had been settled, that the protestant next of kin is only entitled to the profits in case of *descents*, for in the case of a purchase or grant by a papist, they are utterly void by the statute, and therefore allowed the demurrer; so where a plaintiff claims under a will, and it is apparent upon the construction of it as set forth in the bill that he has no title, the defendant may demur; so where one brings a bill as executor for the recovery of some of the testator's assets, wherein it does not appear that he has any ways proved the will, the defendant may shew this as good cause of demurrer; but it is enough to alledge he has duly proved the will, with-

11 and 12
Will. 3. c. 4.
2 Atk. 210.

2 Vef. 217.
Vid. also
Prec. in
Chan. 589.

1 P. Will. 753. The Lord Keeper North, when he first came into this court, was of opinion, that a plaintiff administrator ought to shew by his bill where he had taken out administration, to the intent the defendant might be informed in what court to look for it, which might be void, if taken out under a wrong jurisdiction; yet of late the general allegation of having duly taken out administration has been held good, especially where (as on demurrer) the cause is not then to be determined, but the plaintiff must shew his letters of administration at the hearing; so said and determined by the Lord King in the case of *Stone v. Baker*, 13th December 1732. *Note*, at law a will is never taken notice of so as to permit the executor to sue upon it, until he has first proved it in the spiritual court; but in every other respect, save the liberty of suing, an executor is completely so; before probate, for instance, he may assign or release, &c. Co. Litt. 292. b. * Nelf. Chan. Rep. 88. † 3 P. Will. 371.

out saying in what court: a demurrer was also allowed to a bill brought for the discovery of a personal estate, because it appeared by the plaintiff's own shewing, that they were neither creditors nor legatees*; so where a person brings a bill for an account grounded upon letters of administration taken out or obtained in a foreign court, a demurrer will hold†, for the court of Chancery can take no notice of what is done in a foreign court abroad.

So in every case where the plaintiff in a bill shews only the probability of a future title upon an event which may never happen, he has no right to institute any suit concerning it, and a demurrer will hold to any kind of bill on that ground, which will extend to any discovery as well as relief; so where the claim made by the bill is of a matter in itself unlawful, a demurrer will hold; as where the executors of a counsellor at law brought a bill for money promised to him for advice and pains he had bestowed in causes in which the defendant was concerned; the defendant demurred, and his demurrer was allowed, for that the claim made by the bill was within the statute of maintenance.

Finch, 75.

Treatise upon Pleadings by English Bill, 139.

7. The plaintiff must shew by his bill some claim of interest in the defendant, in the subject of the suit, which can make him liable to the

the plaintiff's demands, or shew that he is for some reason a necessary party to the suit, or the defendant may demur; for it is a general rule that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree; thus a residuary legatee need not be made a party; and for the same reason in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party; and if he is made a party he may demur to the relief, all his interest being assigned to his assignees; so where a bill is brought against an heir for payment of a bond, he may demur, unless it is expressly alledged that he is bound; ^{1 Vern. 180.} and if a bill is filed to have the benefit of or to impeach an award, and the arbitrators are made parties, they may demur to the whole bill, as ^{2 Vern. 380.} well to discovery as to relief; for the plaintiff can have no decree against them, nor can he read their answers against the other defendants.

One reason
amongst

others, why the answer of one defendant cannot be made use of against another, seems to be, because, if that were allowed, I might make a friend co-defendant, who might put in an answer in my favour, and the other defendant would have no opportunity of cross examining to it. 3 P. Will. 311. (Note H.)

Any man made a party that is not charged to claim an interest may demur, for he ought to be examined as a witness; and therefore where a bill was brought against A to discover letters that would be evidence in a cause between C and D, and to produce those letters in evidence, A demurred, and the demurrer was allowed: so where a bill was brought by a ^{2 Eq. Abridg. 78. c. 12.} lessor against an assignee of a lease, to discover whether there was an assignment without licence of the lease to him, wherein there was a covenant that the lessee, his executors, administrators or assigns will grind all their corn, grain, &c.

The Practice of the

Et. at the plaintiff's mill according to the custom, and for a discovery also of what corn, Et. had been ground at other mills; the defendant for one cause of demurrer shewed that it was not charged or averred in the bill, that the defendant was assignee of the lease in question, and also that the covenant stated in the bill was a collateral covenant, and not running with the land, did therefore not bind assigns; and the demurrer was allowed.

1 Ves. 66.
Vid. also
Spencer's
Case,
5 Co. 16
respecting
collateral
covenants.

But in a bill brought by the plaintiff against the *East India* Company, one of the officers of the Company was made a defendant, in order to discover some entries and orders in the book of the Company; the defendant demurred, shewing for cause that it was not so much as pretended by the bill, that he was any way interested in the matter in question, and that the plaintiff could have no decree against him, who was only the officer of the Company; but the court over-ruled the demurrer lest there should be a failure of justice, in regard the Company are not liable to a prosecution for perjury, though their answer be never so false.

3 P. Will.
311.

Hard. 337.
1 Vern. 416.
463.

8. If several matters of different natures are joined in one bill against several defendants, a demurrer will hold, for the court will not permit a plaintiff to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection: but where the defendants demurred, because the bill was brought against several defendants for several distinct matters, yet the demurrer was over-ruled, because the plaintiff by his bill, had charged the defendant with combination, which the defendant had not denied by his answer; but in this however the defendant

1 Vern. 416.

defendant must be cautious; for where a man demurs, for that the bill contains several matters not relating one to the other; if by answer the defendant doth more than barely deny combination and confederacy, he overrules his demurrer, because by his answering further he seems to have waived his demurrer, and given the plaintiff an opportunity of replying. 1 Vern 463.
29.

A demurrer of this kind holds where the plaintiff claims several matters of different natures: but where there has been a possession of a fishery for a considerable length of time, a person who claims a *sole* right to it, may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection upon a demurrer to such bill that the defendants have *distinct rights*, for upon an issue to try the *general right*, they may at law take advantage of their several exemptions and *distinct rights*; for in this case it is to be observed that the plaintiff did not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendants; but he claimed one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants. 1 Atk. 282.

Treatise upon Pleadings by English Bill, 149.

9. It is a general rule that no one is bound to answer, so as to subject himself to punishment or forfeiture: if therefore a bill requires an answer which may subject the defendant to any pains or penalties, he may demur to so much of the bill, for the court will not force a party to make a discovery of that which would tend to make him liable to be charged with a crime: 2 Vef. 245.
Ibid. but it is not in every case the party shall protect himself

Ibid.

himself against relief in this court upon an allegation, that it will subject him to a supposed crime; for in the case of usury or forgery, if proof can be made of it, the court will let the cause go on still to an hearing, but will not force the party by his own oath to subject himself to punishment for it; so in a bill to enquire into the reality of deeds on suggestion of forgery, the court has entertained jurisdiction of the cause, though it does not oblige the party to a discovery, but directs an issue to try whether the deeds were forged.

2 Chan. Rep.
68.

A bill was exhibited against the defendant to make her discover, whether she was married since the death of her husband; to which she demurred, and for cause of demurrer shewed, that several goods and chattels were devised to her by her husband, which she was to enjoy during her widowhood only, and that a discovery might amount to a forfeiture of her interest in them; and the court allowed the demurrer.

1 Ves. 56.

Ibid.

So where a bill was brought for discovery of an assignment of a lease without licence from the lessor, the defendant demurred, because the plaintiff, the lessor, had not expressly waived the forfeiture, and the demurrer was allowed; but if the plaintiff is alone entitled to the benefit of the forfeiture, and expressly waives it by his bill, a demurrer will not hold.

So in a bill brought against an attorney to discover a deed, he demurred, for that he was an attorney at law, and entrusted by his client with the deed, and ought not to discover the matters come to his knowledge as an attorney; but the court ordered him to answer whether there was such a deed, and where the same is, and to whom delivered, and when he last saw it,

it, and in whose custody, but *not* to discover the date or contents.

Finch, 259.

An executor brought a bill for the discovery of the defendant's marriage, who demurred, for that if she was to discover what was asked, it would be a forfeiture of her legacy of 1500l. as it was given conditionally if she married with the consent of the trustees under the will, and the demurrer was allowed; because she could not answer to the marriage without shewing at the same time it was against consent: ^{2 Atk. 393.} but where a husband by will gave an estate to his wife whilst she continued a widow, with a limitation over to another in case of her second marriage; the remainder-man brought a bill for a discovery of the second marriage, and she demurred, as subjecting her to a forfeiture; but Lord Chancellor *Talbot* over-ruled the demurrer, as it was not a condition, but a limitation over of an estate, and therefore could not properly be called a forfeiture. ^{Ibid. in the margin.}

On a bill to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, for that he cannot set forth this without disclosing the very interest he has taken: so where a bill was brought to establish the will of a person deceased, and sought a discovery from the defendant, whether she had any son then living by the said deceased; the defendant demurred, for that she was a competent witness for the plaintiff to examine at law; and the demurrer was allowed; because a bill cannot be brought to discover whether there is such a person, or where he is, in order to make him a party to a suit in this court: but where a bill was brought by a principal to discover what goods ^{Ibid. Dec. per Lord Hardwicke.} the ^{Ibid. 394.}

the defendant bought of his the principal's agent, and the defendant demurred, for that he was not obliged to set out what gain he made by the retail of the goods; but the court said, that where a principal transmits goods to an agent or factor, he may maintain an action against the person who buys of that factor, for what remains due to his factor; and in the case of transferring stock, it is very often done by brokers without the principal being as much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred; and upon these grounds the demurrer was over-ruled.

2 Atk. 394.

A man is not obliged by a discovery to subject himself to a forfeiture, *or any thing in the nature of a forfeiture*; as where a defendant as to so much of the bill which sought to discover whether after institution, &c. to A, he was not presented to two other livings, and instituted, &c. demurred, as such discovery tended to shew an avoidance of A, and the demurrer was allowed: so in all bills to stay waste, a plaintiff is not intitled to a discovery, unless he waives the penalty; for the waiver gives the court a ground of equity to award an injunction, if the plaintiff sues for the forfeiture*; nor is a plaintiff, upon the acts touching the disability of papists†, intitled to a discovery, because these acts create an incapacity, which has the same effect with a forfeiture.

3 Atk. 453.

Vide stat. of
Gloster.

* 1 Ves. 56.

† Vid. 18

Geo. 3. c. 60.

which does

not entirely

remove these

incapacities.

3 Atk. 457.

But in a case wherein a *quare impedit* was brought against the ordinary, who had refused to institute the clerk presented to him by the defendant (the patron), to whom a general bond of resignation had been given; the ordinary, in order to set up that bond as a defence at law,

law, filed a bill to discover whether the clerk presented to him by the defendant had not given a general bond of resignation: the defendant (the patron) demurred, first on account of the legality of such bond; and secondly, that the discovery was immaterial: the court overruled the demurrer, though it admitted the legality of the bond, but was of opinion that the defendant ought to make the discovery, as it would remain with another court to discover how far the discovery was material.

¹ Brown's
Chan. Rep.
97, 98.
Bishop of
London v.
Fytche.

*Of the Form of, and other Matters incidental to,
Demurrers.*

A DEMURRER, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill, is put in without oath, but must be signed by counsel; and a defendant, when served with process to answer, may upon advising with counsel, be enabled to demur to the bill; in which case his demurrer, under the hand of counsel, shall be received and filed, although the defendant do not deliver the same in person or by commission; but if he shall pray a commission, and thereby return a demurrer only, such demurrer upon motion will be discharged.

If a defendant then is advised to make his defence to a bill by demurrer, the draught of the demurrer being settled and signed by counsel, a transcript thereof must be fairly ingrossed on parchment with an half-crown stamp, and brought to the defendant's clerk in court to be filed, leaving a note in the following form with the register, paying at the same time 1s.; and
formerly

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Ord. Chan.
185.

formerly a certificate from the six clerk of the pleadings being filed, was produced, but this of late years has been dispensed with.

Morgan
vers. } Enter demurrer.
Pritchard,

1st February 1790. *Radcliffe*, clerk.

And so if a demurrer be accompanied with a plea or answer, or both, the demurrer and plea, or answer, must be entered, or they are overruled of course.

Each side may, by leaving a petition (*Vid. title Petition*) at the Chancellor's secretary's office, apply to the Lord Chancellor for an order to set down the demurrer to be argued. The petition as answered (for which 20s. is paid to the secretary) being left with 4 s. 6d. at the register office to draw up and pass the order, and 1s. 6d. for entering, and also 1 s. paid for setting the demurrer down; a copy of the order so passed and entered must be served upon the adverse clerk in court, by leaving the copy, and shewing the original order to the clerk or his agent at his seat two days before the day of hearing: and briefs of the bill and demurrer being prepared and given to counsel, the demurrer comes on regularly to be argued.

A defendant may demur to any part of the bill, so as the demurrer be filed before the rule to answer be out, and before he has obtained an order for time to answer; but after such order obtained to put in his answer only, he cannot demur, unless he obtains an order for that purpose; and it is always made the special condition of an order giving the defendant time to demur, plead, or answer to the plaintiff's bill,

bill, that he shall not demur alone; and whenever therefore the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to or answer some part of the bill; so where a defendant has leave to plead, answer, and demur, but not to demur alone, the defendant demurs and answers only by denying combination, the demurrer was set aside on motion, as not complying with the order of the court, it being in effect a demurrer only.

2 P. Will.
287. Lee

v. Pascoe. Brown's Chan. Rep. 78. Vide also Treatise upon Pleadings by English Bill, 171. where the reader will find some excellent observations upon the inconvenience that may arise from too strict an attention to this practice.

As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true; thus if a demurrer is to the whole bill, the whole is taken for true, that is, every thing necessary to support the plaintiff's case which is well charged in the bill; so if a defendant obstinately insists upon his demurrer, and refuses to answer, where the court is of opinion that sufficient matter is alledged to oblige him to answer, and for the court to proceed upon, the court will decree the matter of the plaintiff's bill, for by the demurrer are confessed all matters of fact that are well alledged.

1 Ves. 426.

Ibid.

Pract. Reg.

133.

The rule of the court is, that every demurrer shall express the several causes of demurrer; and in case the demurrer does not go to the whole bill, it must clearly express the particular parts of the bill demurred to; and it is said, that other causes of demurrer than those already expressed may be insisted upon at the argument of the demurrer; but if any cause of demurrer shall be insisted on, besides what is

Pr. Alm.
13.
Ord. Chan.
118.

3 P. Will.
371. Note,

what is said in 1 Vern. 78. Durdant v. Redman, that costs ought to be paid for a new demurrer insisted on at the bar *ore tenus*, is not now the practice, *ibid.*

particularly alledged in the ingrossment on the file, and the bill is dismissed in respect of the cause *newly* alledged, yet the defendant shall pay the ordinary costs, if the causes of demurrer *particularly* alledged are disallowed; so if one demurs to a bill, and that demurrer be ill, the defendant is at liberty to shew a fresh cause of demurrer at the bar *ore tenus*; but if that be held good, he cannot have his costs.

In a general demurrer to the whole bill, if there is any part either as to the relief or discovery to which the defendant ought to put in an answer, the demurrer being entire, ought to be over-ruled: but a defendant may put in separate demurrers to separate and distinct parts of a bill for separate and distinct causes, as where the defendants, as to that part of the bill which sought to compel them to pay the arrears of a quit rent, or which sought any relief touching the same, demurred, for that the plaintiff had his remedy at law for these arrears of quit rent, either by distress or action of debt, on the statute of *Henry 8.*; and likewise put in another separate demurrer as to such part of the bill as sought to compel them to pay a copyhold fine stated in the bill, or which prayed any relief touching the same; and both demurrers were allowed.

3 P. Will.
150, 151.
and the reasons and authorities there cited.

If the defendant puts in a demurrer, which is apprehended will hold good, it is the best way for the plaintiff, if he has a mind to drop proceedings, to move and obtain an order to dismiss his bill with costs, to be taxed by a master, which costs being paid to the defendant,

there is an end of the suit : but if the plaintiff is advised that he has equity on his side, and then intends to proceed, he may apply to the court, either by motion or petition, to amend his bill, on payment of 20 s. costs ; but this is to be done before the demurrer is set down to be argued, otherwise the plaintiff must pay the defendant the costs he has been at in getting an order to set down the demurrer to be argued, and 20 s. besides, before he can amend ; and if a demurrer is put in upon a slip or mistake in the bill, the plaintiff obtains an order to amend upon payment of 20 s. costs, and this he takes care to do before the demurrer is set down for argument.

If a demurrer upon argument is over-ruled, the defendant pays 5 l. to the plaintiff ; but if allowed, the plaintiff pays the same costs to the defendant ; and after the demurrer has been allowed, the defendant is at liberty to move that the bill may be dismissed, with costs to be taxed.

As the register shall not enter any plea, so neither shall he enter any demurrer in the paper at the instance of any person, upon a warrant for setting down the same on a certain day, unless the suitor shall bring such order or warrant to the register to be entered two days before the day appointed for hearing ; and after the paper of pleas and demurrers (to be argued) is made out and set up in the register's office, no addition or alteration shall be made therein : if a demurrer is not entered by the defendant with the register within eight days after the same has been filed, in order to be set down for argument, it is over-ruled of course, and

Pract. Reg.
133.

Ord. Chan.
62.

and the plaintiff may take out process for costs, and a better answer; and as a plea, so a demurrer, may be brought on either in common course, or by order on motion or petition; but they must be determined in open court.

Toth. 11.

Ord. Chan.
218.

If upon a *dedimus* the defendant returns no answer, but a demurrer, or a plea, or both, which shall happen to be over-ruled, he shall pay the ordinary costs; but if upon argument they are allowed good, yet the defendant shall have no costs, because of the needless trouble and delay given the plaintiff by taking out the commission, and having the same returned; for the defendant might have put in his plea and demurrer without that.

Pract. Reg.
134.

It seems, if a defendant be in contempt to an attachment, and tenders or pays the costs of the contempt, he may file his demurrer; but as no plea, so no demurrer shall be admitted after attachment with proclamation returned, but upon motion in open court grounded upon an affidavit accounting for, and satisfying the court of the cause of delay: so where a defendant brought up from the Fleet on an *alias habeas corpus* to answer a bill, put in a demurrer without leave of the court, the court discharged and quashed the demurrer, and granted a *pluries habeas corpus*; but where after a proclamation returned, there came a *general pardon*, and the defendant appeared and put in a demurrer, it was held he might do so.

Ord. Chan.
121.

Pract. Reg.
134.

1 Chan. Caf.
232.

After a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and therefore cannot regularly be amended; but to avoid this consequence, the court has sometimes, instead of deciding upon the demurrer,

demurrer, given the plaintiff liberty to amend his bill, paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties.

Treatise upon Pleadings by English Bill, 174.

If a demurrer and answer be put in, the answer cannot be proceeded on until the demurrer has been argued: if a demurrer to the original bill is over-ruled, there may be a demurrer to the amended bill; but there shall not be two demurrers to the same bill.

Bancroft v. Wardour, 2 Brown's Chan. Rep. 66.

If a defendant having a commission to answer only, tender a demurrer to the commissioners, and refuse to answer upon oath, they are to return such his refusal; and the reason thereof, together with the demurrer, and leave the same to the consideration of the court.

Pract. Reg. 81.

Note, A husband alone cannot demur for his wife.

Of Disclaimers; and herein of Demurring, Pleading, Answering, and Disclaiming to the same Bill.

A DISCLAIMER is where the defendant upon oath, by answer, denies he hath or claims any right or title to the thing in demand by the plaintiff's bill, and disclaims, that is, renounces all claim thereto: in which case, if it appear that the bill was exhibited for vexation only, the court will dismiss it, and give costs against the plaintiff: but if the plaintiff had any probable cause or reason to induce him to exhibit his bill against the defendant, he may, if he pleases, by motion or petition, pray a decree against the defendant, and all claiming under him, since the time of the bill

Pract. Reg.
141.

being exhibited; but this is seldom done without paying the defendant his costs.

If in a bill, among other material defendants, one be named a defendant who nowise pretends any right to the matters in question, and he thereupon disclaims, he may, after such disclaimer, upon a motion or petition to that purpose, be examined as a witness in the cause; for it shall be presumed his name was inserted in the bill without any other cause than that to take away his testimony.

And where a defendant disclaims generally to all the matters in the bill, the plaintiff is not to reply; if he does, and serves the defendant with a *subpoena* to rejoin, the defendant may have costs against the plaintiff, to be
3 Atk. 532. taxed, for the vexation; but if the disclaimer be only to part of the matter in question, but as to the other part there is an answer, in such case there may be a replication to that part which contains the answer.

So where a title is set up to an estate by a bill, and you make a person defendant who disclaims all right, and do not bring him to hearing, the court said, you shall not read his evidence as a proof of your own right, to the prejudice of another defendant.
2 Atk. 39.
Hill v.
Adams.

A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another: but all these defences must clearly refer to separate and distinct parts of the bill: for though a defendant may plead to one part of a bill, and demur to another, yet he cannot, because of the inconsistency, plead and demur to one and the same part of the bill, and besides, the plea overrules the demurrer; and for the same reason, he cannot
demur

demur and answer to the same part of the bill ; 1 P. Will. 80. and the reasons there given.
neither can he plead to that which he has already answered, for the answer over-rules the plea, and *à fortiori* a demurrer.

For the same reason of inconsistency a defendant cannot by answer claim, what by disclaimer he has declared he has no right to ; and an answer and disclaimer being inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer. Treatise upon Pleadings by English Bill, 254.

Of further Answers.

A FURTHER answer is in every respect similar to, and indeed is considered as forming part of the first answer ; so is an answer to an amended bill considered as part of the answer to the original bill. Therefore if the defendant, in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, will be considered as impertinent ; and if, upon reference to a master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer. Treatise upon Pleadings by English Bill, 252. 3 Atk. 303.

Thus where the original bill was brought for discovery only, the amended bill prays relief ; when the defendant comes to answer the amended bill, he cannot put in a complete answer over again ; he can only refer to the former answer ; for if he does otherwise, it will be referred for impertinence ; and therefore this last answer is to be considered as a part of

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the answer to the original bill for discovery, as much as if it had been ingrossed in the same parchment, and a part of the same record.

3 Atk. 303.

A further answer becomes necessary, and is required from a defendant, when it happens that in his first answer he refuses or neglects to answer all or any of the material facts or charges contained in the bill, or answers the same insufficiently, imperfectly, or evasively; the points of the bill not answered, or answered insufficiently, are selected from the record; and being collected together form exceptions, an answer to which is termed a *further answer*.

When matters disclosed by a defendant's answer, or facts existing at the time of exhibiting a bill, and not then known to the plaintiff, are considered necessary by him to constitute part of his case, the same are by the complainant, with leave of the court, added to or inserted in the bill by way of amendment, and the answer which the defendant is compellable to make thereto, is denominated *an answer to an amended bill*.

An answer to an amended bill is prepared and filed with the same formalities, either in a town or country cause, as an answer to an original bill. If the amendments in the bill be so trifling as to require no further answer, it will notwithstanding prevent the complainant from replying, until eight days after the record, or the defendant's office-copy is amended, and delivered over to the defendant's clerk in court; and a defendant sometimes for delay will, upon motion or petition, obtain the three usual town or country orders, for time to answer the amendments (to which in strictness he

is

is intitled); and after the whole time obtained by these orders has been spun out, the defendant files no answer, or a frivolous answer merely to save appearance of wilful delay.

A *subpœna* to answer the amendments is not served when exceptions are taken to an answer where the defendant submits, and the plaintiff obtains an order upon such submission to amend his bill, and that the defendant may answer the exceptions and amendments at the same time; service of the order to amend, and to answer the exceptions and amendments at the same time, by leaving a copy of the order passed and entered, upon the defendant's clerk in court personally, or with his agent at his seat in the Six Clerks office, will be compulsory upon the defendant, and the process of *subpœna* is not necessary. Where amendments are not engrafted on exceptions to an answer, a *subpœna* to make a better answer must be served, and the ordinary process of contempt issued to enforce the answer, if necessary.

Of Replications.

WHERE a full and sufficient answer is put in to the bill, and the plaintiff intends to proceed, he may forthwith file a replication, which is the plaintiff's answer or reply to the defendant's plea or answer, and is also a general assertion of the truth and sufficiency of the allegations contained in the bill, and a denial of the truth of the plea or answer, and of the sufficiency of the matters alleged in it. Pra. Reg. 315.

Though this species of replication, which is a general one, is the only one now in use, it

Ord. Chan.
122.

West, Pr.
Sec. 195.
Pract. Reg.
314.

West, Symb.
Chan. 195.
Pract. Reg.
314.

Gillb. Chan.
110.

Pract. Reg.
315.

Ibid.

Pract. Reg.
316.

may be proper to observe, that formerly, if the defendant by his plea or answer offered new matter which could not be brought into issue by bill and answer, the plaintiff replied specially: a special replication then occasioned the defendant to have recourse to a rejoinder, by which he endeavoured to weaken the plaintiff's replication, and strengthen his own answer; and if the cause was not then at issue by reason of some new matter disclosed in the defendant's rejoinder that required answer, the plaintiff was at liberty to sur-rejoinder; and the consequence of a sur-rejoinder was an adsur-rejoinder or rebutter on the part of the defendant to the plaintiff's sur-rejoinder; the various new allegations which each successive pleading contained, being found to create between the parties considerable perplexities and disputes, besides great inconvenience and delay, an alteration in the practice took place, and special replications, with their consequent train of rejoinder, sur-rejoinders, &c. are now out of use; and the plaintiff is to be relieved according to the form of his petition, *i. e.* bill, whatever new matters may have been introduced by the defendant's plea or answer.

The replication affirms and avers the bill to be true; and it is to be short, and must directly and pertinently pursue the substance of the bill, and confess and avoid, or traverse and deny the answer; and it must by no means be a departure from the bill; for the plaintiff must have his decree *secundum formam petitionis*; for where a plaintiff had inserted matters in his replication, which were not contained in the bill, and which the plaintiff knew of at the time

of

of exhibiting the bill, the defendant pleaded and demurred to the replication, which the court allowed: so where there was a plea and answer to the same bill, and the defendant replied to the plea only, it was held to be irregular; for the replication must be to the answer as well as to the plea; and the cause was put off for that irregularity: but this seems to admit of a distinction where the plea and answer are to separate parts of the bill, and the answer is in no way in aid of the plea, as denying notice, fraud, &c. or where the plea and answer are independent of each other; for in such case the plaintiff may reply to either.

According to the present course of the court, although rejoinders are disused, yet the plaintiff after replication must serve upon the defendant a *subpœna* to rejoin; but if the plaintiff, where he has replied to the defendant's answer, omits or neglects to serve him with a *subpœna* to rejoin, the defendant is at liberty to rejoin *gratis*, in order to have an opportunity of proving the truth of his answer, though the plaintiff cannot *force* him to rejoin without a *subpœna*; so where the defendant has appeared to rejoin *gratis*, or after the return of a *subpœna* to rejoin, served on the defendant, and which, by order obtained of course, is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses, for the cause is at issue by the replication, and a rejoinder is never actually filed.

The signature of counsel is not necessary to a general replication. The plaintiff's clerk in court, instructed by his client, files it of course, the replication being previously ingrossed up-

1 Cha. Rep.

259.

2 Vern. 46.

Mosely 123.

pl. 77. anon.

Pract. Reg.

314.

Mosely 196.

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on parchment with an half-crown stamp, and the day of the month and year when filed being inscribed thereon, with the surname of the plaintiff's six clerk, and clerk in court, who files it, subscribed at the foot, on the left side, and also the term in which the bill was filed, and the surname of the defendant's six clerk. The clerk in court enters it in his cause-book, and then leaves it in his six clerk's study to be filed, usually acquainting the defendant's clerk in court by a note in writing, that he has so done.

The form of a general replication is thus ;

“ Between A B, plaintiff,
C D, defendant.

“ The replication of A B complainant to the answer of C D defendant.

“ This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without that, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true ; all which matters and things this repliant is and will be ready to aver and prove as this honourable court shall direct, and humbly prays as in and by his said bill he hath already prayed.”

The

The plaintiff is allowed by the course of the court to the end of the third term after the coming in of the defendant's answer, to file his replication, exclusive of the term in which the answer was filed; and if no replication be filed within that time, the bill may be dismissed with costs, upon motion or petition, of course, without notice to the plaintiff of such motion, producing the six clerk's certificate of the answer being filed, and no proceedings had for three terms; this certificate is however never called for, the counsel who makes the motion is supposed to have, and in fact always hath it in his hand at the time, for he cannot move without it: the master taxes these costs, and they are recoverable by *subpoena*, as in other cases where costs are to be paid by either party; so if after a replication is filed*, the plaintiff ceases all manner of prosecution for three terms; as where a replication is filed in *Hilary* term, and no proceedings are had in the cause either before or in *Trinity* term following, the defendant is at liberty in *Michaelmas* term to move for the dismissal of the bill; but in this case notice of motion must be served upon the plaintiff, and an affidavit thereof made and filed; if the defendant does not shew cause against the dismissal, and satisfy the court in respect of his delay in proceeding with the cause, the bill will be dismissed of course.

The plaintiff set down his cause to be heard upon bill and answer, and had a decree against the defendant by default; but when the defendant came to shew cause against the decree, it

* Formerly the rule was, that if the plaintiff replied, the defendant could never dismiss the bill, without hearing the cause, because the defendant might rejoin *gratis*, and prove his answer, and so bring his cause to a hearing, *Gilb. Chan.* 114.

Lord Don-
negal v.
Warr,
Eq. Caf.
Abr. 43.

was altered in his favour; the plaintiff petitioned to re-hear the cause, and at the re-hearing prayed leave to reply to the defendant's answer; and he was permitted to do so, upon payment of costs.

In many cases, though the cause require no witnesses to be examined, yet it may be necessary for the plaintiff to reply, whereby the defendant will be put upon proof of his answer, and the plaintiff to prove the matters of the bill; but if the plaintiff reply to an answer, and without rejoinder, or rules, brings the cause to an hearing, the answer shall be taken wholly true, as if there had been no replication; for the opportunity which the defendant had of proving his answer is taken from him.

2 Chan. Caf.
21.

The court will not give leave to withdraw a replication, unless to the application for such leave something further is added, as that the plaintiff may thereby be enabled to amend his bill, or some reason that may induce the court to give the plaintiff this indulgence; because otherwise it may be a contrivance of the plaintiff's to defeat the defendant of his full costs by getting the bill dismissed at the hearing, with 40s. costs only.

Potts v.
Reynoll,

3 Atk. 565.—Note, In Michaelmas term 1747 Lord Chancellor Hardwicke mentioned this case, and gave directions to the Register to frame a general order, which might for the future prevent applications to the court to withdraw the plaintiff's replication, in order to set down the cause on bill and answer only, and by that means get the bill dismissed with costs, according to the course of the court; whereas otherwise he must have paid the defendant his full costs. Vide 3 Atk. 579.

The plaintiff filed a special replication; the defendant pleaded and demurred thereto; his plea was, that since his answer put in, he had recovered the estate in question, in ejectment, upon full evidence at a trial at bar, and demurred

to other special parts of the replication. The plaintiff's counsel admitted the plea and demurrer to be good, which were accordingly allowed; but the court declined giving any opinion whether the plaintiff might not, notwithstanding the plea and demurrer were allowed, afterwards put in a general replication.

1 Vern. 352.

If a defendant disclaims generally, and the plaintiff replies to the answer, and serves a *subpcna* to rejoin, the defendant is intitled to have costs for the vexation, *secus* where the disclaimer is to part, and the answer to the residue.

3 Atk. 582.

Where, by mistake, a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc*.

Mofely 296.

If the plaintiff replies to the defendant's plea, he thereby admits the plea to be good, if it be true; and the validity of it can never afterwards be considered, but only the truth of it, as the defendant proves it, or the plaintiff disproves it, at the hearing.

Proc. in Chan. 58.

Of the Subpcna to rejoin.

IT has been already observed, that rejoinders are disused; but that, according to the present course of the court, it is incumbent upon the plaintiff, after replication, to serve upon the defendant a *subpcna* requiring him to rejoin, unless he will appear *gratis*. The *subpcna* then to rejoin is that which closes the *letis contestatio* between the parties: the effect of this process being merely to put the cause completely at issue between the parties; but if it issues

Gilb. Chan. 115.

Ord. Chan.
54. 125.

Ibid. 115.

Vid. Gilb.
Chan. 123,
124, 125.
and Pract.
Reg. 82.
where the
reader will
find what
the ancient
practice in
rejoining
was, stated
at large.

issues before the replication is filed, and the replication be not filed before the return of this process, the same shall be of no force, and the party on whom it is served shall have the ordinary costs taxed; and this writ may be made returnable on any day certain in term; and anciently was served upon the defendant in the same way that a *subpoena* to answer was served upon him; but this mode of serving the *subpoena* to rejoin is rarely put in practice, unless indeed where the defendant lives in *town*, or within twenty miles thereof, and may be easily served. The most usual method of practice in all cases indiscriminately, is to apply by motion in court, or petition, to the Master of the Rolls, for a *subpoena* to rejoin returnable immediately, and that service thereof on the defendant's clerk in court may be deemed good service; this is entirely of course, and never refused: and in a country cause it is added, that the plaintiff may be at liberty to take out a commission for examination of witnesses, returnable — with liberty to execute the same in —, with the usual directions †.

The order being drawn up, passed, and entered with the register, a *præcipe* for a *subpoena* to rejoin, returnable immediately, in the following form, must be left at the *subpoena* office, producing the order for the *subpoena* passed and entered when the *præcipe* is left at the office,

† These directions are, "That the defendant may join in commission, and strike commissioners names in four days after notice thereof to his clerk in court, or in default thereof, that the plaintiff may have a commission to examine witnesses, directed to his own commissioners."



"*Subpoena*

" *Subpæna John Robinson* to appear in Chancery, returnable immediately, to rejoin with *George Barnet*.

Price, solicitor.

Tested 20th November 1789."

The form of the writ is as follows :

" *George the Third, &c.* To *John Robinson*, greeting. For certain causes, offered before us, in our Chancery, we command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before us, in our said Chancery, immediately after the receipt of this writ, wheresoever it shall then be ; to answer concerning those things which shall be then and there objected to you, and to do further and receive what our said court shall have considered in this behalf ; and this you may in no wise omit, under the penalty of 100*l.* and have there this writ. Witness ourself at *Westminster*, the 20th day of *November* in the 29th year of our reign."

Indorsed, " *By the court, to rejoin and join in commission in the cause of George Barnet.*"

Label : " *John Robinson* to appear in Chancery, returnable immediately, to rejoin with *George Barnet.*"

Five shillings are paid, if there be one or two defendants, and sixpence for the additional label, where there are three defendants : and note, three defendants only can be inserted in one writ ; but husband and wife are reckoned as one defendant. The *subpæna* being obtained

ed from the *subpœna* office, the plaintiff's solicitor serves it upon the defendant's clerk in court *, by leaving the body thereof at the clerk in court's seat in the Six Clerks office, with his agent, or personally upon the clerk in court; serving, at the same time, the order passed and entered for the *subpœna*, with such return, by leaving a copy of the order with the defendant's clerk in court personally, or with his agent at his seat in the Six Clerks office, shewing the original order passed and entered; for unless the order be served, the defendant's clerk in court cannot accept the writ with the extraordinary return; and the service of the order should precede or accompany the service of the *subpœna*.

If the defendant rejoin *gratis*, or the parties go to commission by consent, there needs no *subpœna* to rejoin.

Pract. Reg.
83.

A *subpœna* to rejoin against three, two only are served; if the plaintiff proceeds to examine witnesses, the party not served shall not be concluded by those examinations, being no party thereto.

Pr. H. ch.
15. Pract.
Reg. 315.

Of the Commission to examine Witnesses.

THE *subpœna* to rejoin having put the facts in dispute between the parties in issue, the next concern is to prove those facts: and this is done by examination of witnesses, and taking their depositions in writing, according

* If there be more than one clerk in court employed in the cause (which may be the case where there are several defendants), one or two must be served with labels; and the body of the writ under seal left with the clerk in court last served,

to the manner of the civil law: and for that purpose, interrogatories are framed, or questions in writing; which, and which only are to be proposed to, and asked of, the witnesses in the cause. For the purpose of examining witnesses in or near *London*, there is an examiner's office appointed; but for evidence who live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their oaths, and (if foreigners) upon the oaths of skilful interpreters.

The commissioners are sworn to take the examination truly and without partiality, and not to divulge them till published in the court of Chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination; and when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

It has been already observed, that if witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent where lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in Chancery against the heir, and sets forth the will *verbatim* therein, suggesting

suggesting that the heir is inclined to dispute its validity; and then the defendant having answered, they proceed to issue, as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is intitled to his costs, even though he contests the will: and this is what is usually meant by proving a will in Chancery.

It may not be improper also to observe, that the examination of witnesses in Chancery was originally in court before the Master of the Rolls, who was one of the judges of the court; and therefore it should seem that the examination might be upon the bill, without any interrogatories being drawn or framed; but afterwards the Master of the Rolls having left the examination to his clerks, from thence forward the judge did not examine, but the counsel for the party (whose witnesses were to be examined) framed the interrogatories, upon which the clerks examined; and so by degrees it became the practice and usage of the court to serve a commission to certain commissioners therein named to examine upon interrogatories, as the examiners did above, and within a certain distance of town: such commission being a delegation by the court of part of its authority, authorizing the commissioners to examine *de quibusdam interrogatoriis tam ex parte querentis quam ex parte defendantis*.

Gilb. Chan.
124, 125.

The *subpoena*, returnable immediately, being served as before mentioned, after the expiration of four days, exclusive of the day of service, the plaintiff's clerk in court proceeds to examine those witnesses on behalf of the plaintiff, who live within ten miles of London, by exhibiting interroga-

interrogatories in the examiner's office; it being the course of the court at present, to examine all witnesses in or within twenty miles of *London*, at the examiner's office, and in case of sickness, or other disability, the examiner will attend the witness: after the plaintiff's clerk in court has examined one or two witnesses, or before, a rule to produce witnesses must be entered in the house book, in the Six Clerks office, in that six clerk's division where the cause originally began. The rule to produce witnesses expires that day seven-night, from the day on which it is given; and the rule may be entered on any day in term, provided it be entered eight days before the expiration of the term, otherwise it must be entered on the ensuing term.

The rule is written in the following form in the house book in the Six Clerks office, and a transcript thereof being copied into the rule book of the clerk in court giving the rule, the book is taken to the register's office to be entered; the register sets his initials against the rule in the margin of the book, for which one shilling and fourpence is paid. The clerk in court entering the rule, gives a note in writing to the adverse clerk in court, of such rule being entered.

The rule is entered in the form following :

23d January 1790.

Barnet
v. *Robinson.* { A rule is given to the defendant
to produce witnesses.

BARKER, clerk for plaintiff.

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Seven

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Seven or eight days after giving this rule, you may enter in like manner another rule for passing publication, and give notice thereof in the same manner as before; and leave the following note with the entering register;

1st February 1790.

Barnet v. *Robinson.* { A day is given to the defendant to shew cause why publication should not pass.

BARKER, clerk for plaintiff.

So if the plaintiff takes out a commission for examination of witnesses in the country, and if the defendant does not join therein (*i. e.*) by naming commissioners on his part, or if he does join in such commission, but examines no witnesses, then the plaintiff's clerk ought upon the return of such commission, to give two like rules, as before.

But if both sides examine witnesses by such commission, then upon the return of such commission, the plaintiff need only give one rule as before, for passing publication, which is as follows:

22d January 1790.

Barnet v. *Robinson.* { A day is given to the defendant to shew cause why publication should not pass upon a joint commission.

BARKER, clerk for plaintiff.

Note; Each of the rules abovementioned, in strictness, expires that day seven-night after the respective

respective dates of such rules; and after the expiration of the rule given for passing publication, no witness can be examined on either side, unless an order be obtained for enlarging publication before such rule expires, or the plaintiff and defendant's clerks agree to enlarge publication by consent.

It has been already observed, that in a country cause, or where the witnesses reside above twenty miles from *London*, the examination of witnesses is by commission, issued under an order of the court obtained for that purpose; and where they reside in or near *London*, their examination takes place in the examiner's office;—of these two modes of examination, I shall treat separately in the order in which they stand; and, with a view to greater perspicuity, divide into distinct and separate heads, the several matters properly belonging to each mode of examination, and consider the same with a reference to those heads.—
And first,

Of Joinder in Commission.

THE plaintiff's solicitor having given his clerks in court four commissioners names, any time after the expiration of four days exclusive of the day of service of *subpœna*, and of the order passed and entered, the plaintiff's clerk in court may call upon the defendant's clerk in court to join in commission; and upon neglect or refusal to give the commissioners names within four days, the plaintiff may in *strictness* take the commission *ex parte*; and in that case, notice of executing the commission

Ord. Char. c.
47.

is not necessary. But when the defendant means to join in commission, the plaintiff's and defendant's clerks in court having interchangeably given four commissioners names, for their respective clients; the eight names are entered by the clerks in court in their respective commission books; and this is termed *joining in commission*. The plaintiff's clerk in court sends to his client a list of the defendant's commissioners names, and receives instructions to whom of the defendant's commissioners the commission is to be directed. The defendant's clerk in court, having in like manner received instructions from his client, to whom of the plaintiff's commissioners he would have the commission directed; the plaintiff's clerk in court, by note in writing, informs the defendant's clerk in court, he is ready to *strike commissioners* names; and the defendant's clerk in court being prepared, and consenting, the commission books are produced, and two of the names on each side are struck out with the pen by the respective clerks in court; the plaintiff's clerk in court first striking out one of the defendant's commissioners names, the defendant's clerk in court then strikes out one of the plaintiff's commissioners names, and so alternately, until the eight names are reduced to four; and which four are the commissioners.

The plaintiff's clerk in court makes out the commission for examination of witnesses, (the order for that purpose passed, entered and served, being previously left with him,) inserting the four commissioners names therein, which when sealed, he sends to his client to be executed: the form of a joint commission is as follows:

“ George

“ George the Third, &c. To ——— greet-
ing: Know ye, that we, in confidence of your
prudence and fidelity, have appointed you, and
by these presents do give unto you, any three
or two of you, full power and authority, dili-
gently to examine all witnesses whatsoever
upon certain interrogatories to be exhibited to
you, as well on the part of A B complainant,
as on the part of C D defendant, or of either of
them; and therefore we command you, any
three or two of you, that at certain days and
places to be appointed by you for that purpose,
you do cause the said witnesses to come before
you, and then and there examine each of them
apart upon the said interrogatories, on their
respective corporal oaths first taken before you,
any three or two of you, upon the Holy Evan-
gelists; and that you do take such their exami-
nations, and reduce them into writing on
parchment; and when you shall have so taken
them, you are to send the same to us in our
Chancery ——— wheresoever it shall then be,
closed up and under your seals, or the seals of
three or two of you, distinctly and plainly set,
together with the said interrogatories, and this
writ. And we further command you, and
every of you, that before you act in or be
present at the swearing or examining any witness
or witnesses, you do severally take the oath first
specified in the schedule hereto annexed; and
we do give you, any three, two, or one of you,
full power and authority, jointly or severally,
to administer such oath to the rest, or any other
of you, upon the Holy Evangelists. And we
further command, that all and every the clerk
or clerks, employed in taking, writing, trans-
cribing or engrossing the deposition or deposi-
tions

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tions of witnesses to be examined by virtue of these presents, shall before he or they be permitted to act as clerk or clerks, as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed: And we also give you, or any one of you, full power and authority, jointly and separately to administer such oath to such clerk or clerks upon the Holy Evangelists. Witness ourself at *Westminster*, the ——— day of ——— in the ——— year of our reign.

Arden, Hammer."

Indorsed, " *By order of court.*"

Label. "To (*insert commissioners*) any three or two of them, a commission to examine witnesses as well on the part of A B plaintiff, as on the part of C D defendant, returnable ——— on fourteen days notice to defendant.

Arden, Hammer."

To this commission are annexed the following forms of oath, (printed upon parchment,) to be administered to the commissioners, and to their clerks.

The Commissioners Oath.

"You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced, and left with you. And you
to

shall not publish, disclose or make known, to any person or persons whatsoever, except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you and the other commissioners in the said commission named, or any of them, by virtue of the said commission, until publication shall pass by rule or order of the high court of Chancery.

So help you God."

The clerk's oath.

" You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and ingross, the depositions of all and every witness and witnesses produced before and examined by the commissioners, or any of them named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any of them, to take, write down or ingross the said depositions, or any of them." And you shall not publish, disclose or make known, to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed or ingrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass by rule or order of the high court of Chancery.

So help you God."

Sometimes a party will join in commission, and afterwards refuse or neglect to strike com-

missioners names; an application must in that case be made to the Master of the Rolls by petition; and his Honour will at his discretion strike out two of the names, the four given by the petitioning party being inserted for that purpose in the petition; but this proceeding will not prevent the petitioners clerk in court from striking out such two of the adverse party's commissioners, as he would have done, had no such application been necessary; and the commissioners names thus procured are to be inserted in the commission.

Gillb. Chan.
135.

The commissioners ought to be indifferent persons; and after names are struck, and one of the parties finds that the adverse party's commissioners, or one of them, is of kin, or counsel or solicitor for the party; the court upon motion, or the Master of the Rolls upon petition, will order the adverse party to name commissioners *de novo*, in the place of one or more of them so complained against.

Pract. Reg.
85.

The common exceptions to a commissioner are,

1. That he is of kindred, allied to the party for whom he is named.

2. That he is master to the party, his landlord or partner.

3. That he hath a suit at law with the party adverse to him for whom he is named commissioner, or is of counsel, or is attorney, or solicitor, or follower of the cause on one side.

4. That the party is indebted to him; or any other apparent cause of partiality, or siding with either side.

Toth. 20, 21.
Pract. Reg.
85.

The commissioners are made returnable on a general return day, or on any day certain in term, and they are not unfrequently made *ou* returnable

Gillb. Chan.
135.

returnable without delay; which return, if the commission be made out in term time, holds to the first return of the ensuing term; if made out in the vacation, to the last return of the subsequent term.

If a commission in *England* be taken out in the vacation, and has not a certain return, but only *sine dilatione*, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return: though formerly it has been, ^{3 Atk. 593. Barnley v. Powell.} that a commission returnable *sine dilatione*, if it be within the kingdom, must be returned by ^{2 Vern. 197.} the second return of the next term; and if executed afterwards it was void.

By the rule of the court, the plaintiff is first ^{3 Atk. 593.} entitled to the suing out and carriage of the commission to examine witnesses; and if the defendant has an opportunity of examining his witnesses, he is not entitled to a new commission; but if the plaintiff neglects to sue it out, it may be done *ex parte defendantis*; so if the defendant has witnesses which live beyond sea, where the plaintiff has none, it should seem that the defendant shall have a commission granted him for examining his witnesses only; and so he ^{Praet. Reg. 83.} shall if his witnesses here live far distant from the plaintiff's, as sixty or eighty miles: so if ^{Ibid.} when the cause is at issue the plaintiff will not go on to commission, the defendant may have a commission to examine his own witnesses, and shall have the carriage thereof: and so per- ^{Toth. 16.} haps, if the plaintiff commit any gross abuse in the execution of the first commission, the defendant shall have the carriage of the second; or ^{Praet. Reg. 83.} where a commission lost by him who had the carriage of it, is renewed, the other side hath commonly

commonly the carriage thereof; but in all these cases, the plaintiff may join in commission, and cross examine the defendant's witnesses, or examine what other witnesses he is advised upon such commission.

In some cases the court will indulge the defendant with a duplicate of the commission, especially if it is doubtful, whether the plaintiff will execute his commission or not, and more especially if he is forced on by the defendant, (as in an injunction cause where delay is only designed;) and if the plaintiff who hath the carriage of the commission, refuses to give notice of the execution thereof, or does not intend to execute it, then the defendant may make use of his duplicate, and proceed to the examination of his witnesses by virtue thereof: but these duplicates are seldom asked for, and as rarely granted, but upon good reason offered to the court, and upon extraordinary occasions, or by the consent or agreement of the parties among themselves.

Gilb. Chan.
335.

When a commission is awarded to examine witnesses, if by default of him that hath the carriage of the commission, or by his commissioner, nothing is done, he shall bear all the charges that the other side was put unto about that commission, either for fees of court, bringing or entertaining commissioners, or otherwise, to be ascertained *before the master* by the oath of the party, or of him that disbursed the money for him, and shall renew the commission at his own charges.

Ord. Chan.
332.
Pract. Reg.
86.

Cl. Tut. 30.
Pract. Reg.
86.

It is said, that a commission to examine cannot be discharged upon a petition without reference, and a certificate, (of irregularity.)

Of the Notice to examine, and other Proceedings necessarily antecedent to the Examination.

THE commission for the examination of witnesses being procured in the manner before described, is sent by the clerk in court to his client in the country, the solicitor *for the party, plaintiff or defendant, who obtains the commission: the solicitor, upon the receipt of the commission, apprises his own commissioners thereof, and keeps it unopened until the day appointed for the execution thereof; the time and place of executing the commission being settled among themselves: if it be a joint commission, the solicitor for the party who has the carriage of it must procure a notice in writing to be subscribed by two of his commissioners, appointing the time and place of execution, and directed to those parties to whom, by the label of the writ, notice is directed to be given.

The notice may be in the following form:

"Whereas we whose names are hereunto subscribed have received a commission, issuing out of, and under the seal of the high court of Chancery, to us and others directed, for the examination of witnesses in a certain cause there depending between *Henry Allen* plaintiff, and *Francis Cozens* defendant: These are to give you notice that we will execute the said commission on the behalf of the plaintiff (*or defendant*) at the house of ———, known by the sign of ———, situate in ———, in the
county

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county of — —, on *Monday* the 15th day of *August* instant, at the hour of eleven o'clock in the forenoon of the same day; when and where you, and your commissioners and witnesses, may be present, if you please.—Given under our hands this 1st day of *August* 1790.

To Mr. *Francis* }
Cozens. }

Joseph Harding,
John Bennet."

This notice in writing must specify the title of the cause, the time when, and the place where the execution of the commission is appointed to be held; it must also be served upon *all the parties* personally, or left at their respective dwelling-houses or places of residence, with one of the family, *ten days* in the *Easter vacation*, and fourteen days in any other vacation, previous to, and exclusive of the day appointed for the execution of the commission.

And note, if notice be not given of executing the commission, the court will suppress the examinations, and grant the adverse party a new commission.

Com. Sol.

30.

Pr. Alm. S.

The witnesses to be examined at the execution of the commission may be served with a summons to appear before the commissioners, at the time and place therein mentioned, to depose their knowledge to and of each interrogatory.

The

The summons may be in the following form :

A summons for witnesses to appear before the commissioners to be examined.

“ In Chancery,

“ Between *Henry Allen*, plaintiff,
Francis Cozens, defendant.

“ Whereas we have received a commission issuing out of, and under the seal of the high court of Chancery, to us and others directed, for the examination of witnesses in a certain cause there depending between *Henry Allen* plaintiff and *Francis Cozens* defendant: And whereas we are informed, that you whose names are hereunder written are material witnesses for the plaintiff (*or defendant*); we therefore, by virtue of the said commission, will and require you, and every of you, severally and personally to be and appear before us the said commissioners, or any two or more of us, at the house of ———, known by the sign of ———, situate in ———, in the county of ———, on *Monday* the 15th day of *August* instant, at the hour of ten o'clock in the forenoon, then and there to be examined, and to testify the truth, according to the best of your knowledge, for and on the behalf of the said plaintiff (*or defendant*); and you are then and there to attend, and not depart until you have been examined on the part of the said plaintiff (*or defendant*;) and herein you are not to fail. Given under our hands, &c.

To *George Yate, Simon*
Thelwall, Ambrose Gif-
fins, and Andrew
Chapman.

Joseph Harding,
John Bennet.”

These

These summonses must be signed by two or more of the commissioners, and directed to the witnesses by name, and must be personally served upon, and left with them severally and respectively, before the execution of the commission: but these summonses should be served upon those only who are presumed to be *willing* witnesses, and whose attendance may be depended upon by the party upon whose behalf they are summoned to appear; a summons not being in its nature and effect an absolute compulsory *mandate*; for it is said, that no attachment lies against a witness for not attending to give his testimony before the commissioners, in obedience to the summons served upon him; and that, because no *writ* is directed, nor the great seal shewn to him: besides, it seems necessary to pay or tender to the witness summoned to appear his reasonable charges, for otherwise he may not perhaps be bound to appear; and in such case, an attachment for non-appearance was superseded: but it is certain, that if the witness insists on having his charges in hand, and reasonable charges are not given or tendered to him, he is not bound to appear and give his testimony before the commissioners.

Pract. Reg.
348.

Ibid. Pr. H.
Ch. 161.

Pract. Reg.
348.

It seems however that the court, in aid of the commissioners summons, might so far interpose, where a witness has been duly served with the commissioners summons to give evidence, and neglected or refused to attend the commissioners, as upon motion (grounded upon a certificate in writing by the acting commissioners of the non-attendance of a witness duly summoned, supported by an affidavit made and filed, of the *personal* service of the commissioners

missioners summons, and *reasonable* charges tendered or paid, if demanded) to make an order upon the witness, at his own expence to attend the examiner at the examiner's office, ^{Pract. Reg. 90.} and be examined within a limited time after service of that order, or in default, that he stand committed to the Fleet prison. ^{Cl. Tut. 9.}

The counsel's brief on this motion being left at the register's office, and the order drawn up, passed and entered at the same office, a true copy of the order, so passed and entered, is to be served upon the witness *personally*, shewing at the time of service the original order, passed and entered: Interrogatories for the examination of the witness being previously filed at the examiner's office; if the witness, after *such* service of the order, neglect or refuse to attend and be examined, and shew no cause to the contrary, before the expiration of the time limited by the order, a certificate should be procured from the examiner that the witness has not attended to be examined, and an affidavit made and filed of the *personal* service of the order, the court upon motion to commit the witness, and hearing the certificate and affidavit of service of the order read, if sufficient cause be not shewn on the part of the witness, will make an order for the commitment of the witness to the Fleet prison.

The counsel's brief being sent to the register's office, and the order made thereon drawn up, passed and entered there, the original order must be delivered to the tipstaff of the court, who will thereupon obtain a warrant from the Lord Chancellor's secretary, and with proper instructions from the solicitor, apprehend the witness, and deliver him into
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the custody of the warden of the Fleet prison, from where he will not be discharged, until he has conformed to the examination required, and paid all costs : but if any irregularity has been incurred in the service of either the summons or orders, or reasonable expences have not been tendered or paid to the witness when demanded, he may and should *in limine* come in and shew cause upon the first order; and if the cause assigned be sufficient, the order will be discharged, and perhaps with costs, as the circumstances of the case may be.

But the better and most certain, and indeed most usual mode of compelling from an unwilling witness attendance upon the commissioners is by suing out a *subpœna ad testificandum* against him; for which purpose a *præcipe* must be left at the *subpœna* office, in the following form:

“ *Subpœna Simon Thelwal* to appear before *Isaac Bromley* and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Jonathan Simpson*.

Price, solicitor.

Tested 10th July 1789.”

The form of a *Subpœna* to testify is as follows :

“ *George the Third, &c.* To *Simon Thelwal*, greeting. We command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before *Isaac Bromley* (*one of the commissioners*), and others, commissioners appointed in our Chancery, at such times and places

places as the bearer hereof shall appoint, to testify the truth in a certain cause depending in our said court on the behalf of *Jonathan Simpson*; and this you may in no wise omit, under the penalty of 100l. Witness ourself at *Westminster*, the 10th day of *July* in the 29th year of our reign."

Indorsed, "*By the court.*"

Label: "*Simon Thelwal* to appear before *Isaac Bromley* and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Jonathan Simpson.*"

Note, the expence of this writ is 5 s. if one or two witnesses names be inserted; and 6 d. for the additional label if the writ contains three witnesses; but no *subpæna* can contain more than three witnesses names, except it happens that husband and wife are necessary witnesses to be inserted in the writ, in which case they shall be accounted but as one: at a private seal, the expence of this process is 4s. extraordinary; and if the seal be opened 2l. 10s. 6d. exclusive of the ordinary expence.

The *subpæna* to testify being thus procured, is to be served upon the witness *personally*, by delivering to him the body of the writ under seal, where there is only one, reserving the label, and delivering at the same time the commissioners summons, tendering at the time of service 1s.; or if the witness be at any distance from the place of executing the commission, his *reasonable* expences must be paid or tendered. If there be two or three witnesses in the *subpæna*, the two first must be *personally* served

Præ. Reg.
347.

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with labels severally, shewing the process itself under seal, at the time of service; and a summons, as before mentioned, must be served upon them severally and respectively at the same time. The process itself must be left with the witness last served, the party serving the process taking a copy of the label, in order to enable him to make an affidavit of service with safety.

If a witness thus served with a summons and *subpoena* to testify, neglects or refuses to appear, or appearing, refuses to give evidence before the commissioners, or to assign a sufficient reason for withholding his testimony, a certificate of such witness's neglect or refusal, must be procured in writing from the acting commissioners, and an affidavit made and filed of the service of the *subpoena* to testify, and the commissioners summons; and the same compulsory line of process before stated, upon a neglect or refusal to attend the commissioners summons, pursued against the witness.

The production of deeds, papers, &c. in the custody of a witness may be enforced at the examination of a witness, either at the examiner's office, or at the execution of a commission to examine witnesses, by adding to the ordinary writ of *subpoena* to testify a clause of requisition for that purpose, which is thence denominated a *subpoena ducens tecum*. This writ is obtained by leaving a *præcipe* at the *subpoena* office, in the following form:

“ *Subpoena Isaac Hartwell* to appear before *John Chambers* and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Benjamin Atkins*,

Court of Chancery.

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Atkyns, and bring with him and produce (an indenture of settlement, bearing date the 16th day of *December* 1778, and made, or mentioned to be made, between *Samuel Davenant* of, &c. *John Hutchinson* of, &c. *William Richardson* of, &c. *Edward Shackfield*, and *John Sullivan* of, &c.) now in his custody.

Jackson, solicitor.

Tested 10th *July* 1789."

The writ of *subpœna ducens tecum* to testify, is in the following form :

" *George the Third*, &c. To *Isaac Hartwell*, gentleman, greeting. We command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before *John Chambers* and others, commissioners appointed in our Chancery, at such times and places as the bearer hereof shall appoint, to testify the truth in a certain cause depending in our said court, on the behalf of *Benjamin Atkyns*, and to bring with you and produce at such times and places as aforesaid (describe the deed, &c. thus;) a certain indenture of settlement, bearing date the 16th day of *December* 1778; and made, or mentioned to be made, between *Samuel Davenant* of *Epsom* in the county of *Surry*, Esq; of the first part; *John Hutchinson*, of the same place, gentleman, of the second part; *William Richardson* of *Horsham*, in the county of *Suffex*, gentleman, of the third part; and *Edward Shackfield* and *John Sullivan* of *Epsom*, in the county of *Surry*, gentleman, of the fourth part; now in your custody; and this you may in no wise omit, under the penalty of 100*l*.

G g 2

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Witness ourself at *Westminster*, the 10th day of *July*, in the 29th year of our reign."

Indorsed, "By the court."

Label: " *Isaac Hartwell* to appear before *John Chambers*, and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Benjamin Atkins*, and bring with him and produce (an indenture of settlement, bearing date the 16th day of *December* 1778, and made, &c. as set forth in the body of the writ,) now in his custody."

The expence of this writ is the same as the foregoing writ of *subpæna* to testify before commissioners; but if the description of the deed or other document to be produced, occasions the writ to run an extraordinary length, a charge is made in proportion.

The commissioners should, in their summons to the witness, briefly describe the deed or instrument to be produced, and the summons and *subpæna ducens tecum* should be served in like manner as a *subpæna* to testify.

Note, The *subpæna ducens tecum* is so called from the words of the writ, which commands the party to appear in court such a day, *ducens tecum* a deed or writing, &c. confessed by his answer to be in his custody; or to shew good cause to the contrary.

Sometimes it is general, for all writings touching such a matter: and sometimes this writ is granted where the defendant confesses money in his hands, and offers to pay it into court, or the court orders it to be paid in.

This writ must be had upon motion and order; it is to be made by the clerk of the *subpæna*

West. sect.
54. 55.

Pract. Reg.
346.

Ibid.

Court of Chancery.

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subpena office only; and is to be served as a *subpena* to answer. Ord. Chan. 36.

But note, all this is now commonly done by order, on motion; and this writ is little used. Prac. Reg. 346.

Of Interrogatories.

INTERROGATORIES are questions exhibited in writing by the party, plaintiff, or defendant, directed by the court to be proposed to and asked of the witnesses in a cause touching the merits thereof, or some incident therein. Also Prac. Reg. 218. interrogatories are touching contempts of writs, processes, and orders of court, whereupon the party offending is to be examined concerning such contempt, &c.

As on hearings upon bill and answer, no evidence is to be admitted (except matters of record) but what arises from the bill and answer itself; so when the parties proceed to the examination of witnesses, the cause is determined by such evidence as arises from the depositions of witnesses examined upon interrogatories. And both the plaintiff and defendant may ordinarily exhibit interrogatories; for when parties are at issue, it is necessary to consider, as well what the other side may examine unto, as what ourselves can prove, and so counter or cross interrogatories may be prepared, if there be occasion. Ibid. 3204

Where interrogatories are exhibited in the examiner's office, and witnesses examined thereon, either party may, without application to the court, or order for that purpose, exhibit

The Practice of the

Witness ourself at *Westminster*, the 10th day of *July*, in the 29th year of our reign."

Indorsed, "By the court."

Label: "Isaac Hartwell to appear before John Chambers, and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of Benjamin Atkins, and bring with him and produce (an indenture of settlement, bearing date the 16th day of *December* 1778, and made, &c. as set forth in the body of the writ,) now in his custody."

The expence of this writ is the same as the foregoing writ of *subpœna* to testify before commissioners; but if the description of the deed or other document to be produced, occasions the writ to run an extraordinary length, a charge is made in proportion.

The commissioners should, in their summons to the witness, briefly describe the deed or instrument to be produced, and the summons and *subpœna ducens tecum* should be served in like manner as a *subpœna* to testify.

Note, The *subpœna ducens tecum* is so called from the words of the writ, which commands the party to appear in court such a day, *ducens tecum* a deed or writing, &c. confessed by his answer to be in his custody; or to shew good cause to the contrary.

Sometimes it is general, for all writings touching such a matter: and sometimes this writ is granted where the defendant confesses money in his hands, and offers to pay it into court, or the court orders it to be paid in.

This writ must be had upon motion and order; it is to be made by the clerk of the *subpœna*

West. sect.
54, 55.

Pract. Reg.
346.

Ibid.

Court of Chancery.

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one or more interrogatories, or a new set of interrogatories, for further examination of the same or other witnesses; but where the commission is taken out for examination, there no new interrogatories, or set of interrogatories, can be exhibited without motion or order of the court. And the reason of the difference was said to be, because the examiner is an officer of credit, and sworn, and so presumed to be impartial, and that he will not disclose the depositions to either party; but the commissioners are private persons, and not sworn, and are called the plaintiff's commissioners or defendant's commissioners; and so without leave of the court no new interrogatories can be added before them.

Gilb. 42.

But this practice is altered by an order made 8 Geo. 1. which enacts, That all commissioners and their clerks, before they act in the commission, shall severally take an oath not to publish or disclose the contents of the depositions to be taken; which oath is to be annexed in a schedule to the commission; and also in all commissions which shall issue to examine witnesses, a clause to that effect is to be added, and made part thereof; and any commissioner or clerk acting contrary to the premises, on proof of the offence shall be punished as the court shall think fit to adjudge and order.

When the parties have copies of the depositions delivered to them, and come to see the interrogatories exhibited by each side, and find the interrogatories to be too leading or impertinent, then is a proper time to refer them to a Master for being too leading, impertinent, or scandalous. This is done by motion or petition of course. If the Master reports the in-

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interrogatories leading, and this report is not excepted to, then all the depositions taken to these interrogatories must stand suppressed as of course by motion or petition: But if the report is excepted to, as on the one hand the court never countenances leading or impertinent interrogatories, so on the other hand they are not over curious in these matters, because it may fall out, that interrogatories may be reported illegal in the very vital of the examination and on the very point the cause turns; and when this comes to be the case, the party who refers them gains his end; for perhaps he had a very bad cause if the depositions had stood; whereas if they are suppressed he has a very good one, since his adversary must hear the cause without any proof at all; unless the court is pleased to grant him another commission on payment of costs for his leading interrogatories; which is seldom or never done after depositions are published. And it is hard, that in equity a man should Gillb. 42. be deprived of a plain right through the slip of another man's pen, or the inadvertency or unskilfulness of his counsel penning his interrogatories; and therefore if it is possible for the court to help him they will, from the manifest inconvenience which must attend such a case. Indeed, if interrogatories are reported leading in points upon which the gist of the case does not turn, and, if the depositions in these parts should be suppressed, the party might have evidence left without it, there is no hurt done; but if the life and quintessence of the cause turn upon it, he ought to struggle to the last before his depositions are suppressed.

New interrogatories *were ordered to be exhibited on suppressing the old.* In this case, the interrogatories, and the depositions of witnesses taken on them, had been suppressed, for that the interrogatories were leading, and then publication passed. And now the court was moved, that a new set of interrogatories might be drawn and settled by the Master, for the examination of this witness, whose evidence was very material, and yet must be wholly lost, if the court would not indulge them this way; and though the practice has been always against it, and it was insisted to be of dangerous consequence, yet one precedent being produced to this purpose, and the interrogatories which had been suppressed were such as might have been drawn up by many other counsel, without any apprehension of their being leading; the court, to let in the party to the benefit of this witness's testimony, ordered new interrogatories to be settled by a Master, and put in for his examination over again.

Spence v.
Allen,
Gilb. 150.
Eq. Caf.
Abr. 232.
S. C.

All interrogatories must be drawn, or perused and signed by counsel; and they are to be short and pertinent, and necessary to the point: They must not be leading, as, *Did you not do, or see such a thing?* &c. If they are such, the depositions taken thereon will be suppressed; and so it is where the interrogatories are too particular, or point to one side of the question more than the other.

Ord. Chan.
217.

They must be ingrossed on parchment with double 12d. stamps, and are to be exhibited before any witnesses examined on either side: And if witnesses are to be examined before an examiner of the court, the interrogatories must be produced before, and left with him at the office:

Pract. Reg.
220.

office: If in the country on a commission, the interrogatories may be exhibited before the commissioners on opening the commission, which is now the general practice. Though it is said, that heretofore the interrogatories were always included in the commission.

Vide Ord.
Chan. 216,
217.

When witnesses are examined in court upon a schedule of interrogatories, there shall be no new interrogatories put in to examine the same witnesses: but new interrogatories, by leave of the court, may be exhibited in court for examining new witnesses at any time before publication, notwithstanding there has been a joint commission executed in the country. And on a *supplemental bill*, the court will, upon motion, give leave to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplemental matter.

Ibid. 126,

No re-examination of witnesses is allowed, though upon the same interrogatories, without leave of the court: but if either party have a commission *de novo*, after he hath examined on a former, he must examine on the same interrogatories as were exhibited by him on the former commission; and no other interrogatories can be admitted without an order, or consent of parties.

If leave is given to examine a witness after publication, and before hearing, a Master is commonly ordered to settle the interrogatories, and that they may be to such points only as were omitted before, and as are now ordered to be examined unto; unless it be merely to prove an exhibit, and the interrogatory was before filed.

And all interrogatories for proving particular points needful upon a reference to a Master, shall

shall be directed by the Master, and shall be to such points only.

And though, by the orders of the court, the parties are to make their full proof before publication and hearing of the cause, yet after hearing, if there be a reference to a Master for the stating an account, or such like matter, and he shall find any particular points and circumstances needful to ground his report upon, which are not fully proved, nor could properly be examined to before the hearing of the cause, he may direct the parties to draw interrogatories to such points or circumstances only; and such witnesses are usually examined before such Master upon such interrogatories, if the witnesses be or reside within ten miles of *London*; but if farther off, and the parties desire it, he may by his certificate direct a commission into the country, which is to be made out by the plaintiff or defendant's clerk that desires such commission: and on the return of such commission, publication shall forthwith pass according to the course of the court.

Vid. Ord.
Chan. 156.

But the more common way now is, not to examine to a matter of account before hearing, but after, before a Master, if the witnesses be in town or near; if not, then by commission to be directed by the Master upon his certificate. And either party may examine witnesses to an account, or to a particular thing, after hearing.

In case of a prosecution of a contempt for breach of an order of court, or otherwise, grounded upon an affidavit, the interrogatories shall not be extended to any other matter than what is comprehended in the said affidavit or order. And if any other shall be exhibited, the party examined may for that reason demur unto them, or refuse to answer them.

A de-

A defendant having answered the first interrogatories imperfectly, was ordered to be examined on new ones; which being exhibited, he answered only the former: upon motion the court ordered him to pay costs, to be taxed by a Master, as not having obeyed the order of the court, but given the plaintiff a needless expence.

Pract. Reg.
218.

After a party is brought in upon a contempt, and is ordered to be examined upon interrogatories; if he refuses, he will be committed: so it is if he enters his appearance with the register, upon a process of contempt, and is ordered to be examined, and departs without being examined, and without licence.

Ibid.

An order was obtained on a motion of course, that the plaintiff should be at liberty to add some new interrogatories for the examination of the defendant, the examinations already put in being reported insufficient, and that both sets of interrogatories may be answered at the same time.

Lord Chancellor: I find no instance of an order of this sort, on a motion of course: it has some analogy to orders for amendment of bills, where answers have been reported insufficient; and if this practice is not of course for adding interrogatories, on an examination being reported insufficient, I will not set up this as an instance, and thereby introduce a new practice.

If the party wants to add new interrogatories, on an examination reported insufficient, an application should be made to the court by notice to the other party, that the court may be apprized whether there is a ground for it; but as this was an order obtained on a motion of course,

3 Atk. 478.
Anon.

course, the court thought it irregular, and discharged the order.

Defendant's fourth interrogatory, touching the boundary of *Cranbourn Chase* being leading, was, together with the deposition, suppressed; on application, leave was given to exhibit new interrogatories for examination of the same witnesses, to be settled by the Master. The examining witnesses after publication is attended with inconveniences; and it must not be understood, that the court will always allow such indulgence, where depositions have been suppressed; but it depends on the particular circumstances of the case. It does not appear in this case, that the interrogatories (though improperly framed) were done with any ill design. There are two reasons which weigh with me to give liberty to re-examine the witnesses. The suit is brought for relief, and to perpetuate the testimony of witnesses. If the defendant's depositions are suppressed, none other will be taken but what are taken on the part of the plaintiff; and the framing of the interrogatories seems to have been through inadvertency; and the defendant is an infant, and ought not to be prejudiced by the inadvertency of those concerned for him; and the court would of course, when he comes of age, give him leave to re-examine his witnesses.

Ambler's
Rep. 585.

An order having been obtained for the examination of certain persons before the Master, *pro interesse suo*, liberty was now moved for to exhibit interrogatories before the Master, to falsify their examination, and ordered, as of course, without notice.

2 Brown's
Chan. Rep.
15.
Rowley v.
Ridley.

No interrogatories can be put, that do not arise from some fact charged in the body of the bill,

bill, or, if such interrogatories be put, the defendant may either demur to such interrogatories, as having no foundation in the bill, or may omit to answer them; and if there be exceptions for want of an answer to such interrogatories, the exceptions on a reference will be over-ruled with costs. Gilb. Chan. 219.

The interrogatories were anciently annexed to the commission, and so they are now supposed to be; but by consent of parties, they are delivered to the commissioners at the opening of the commission, which is the present practice: but the commissioners can only examine upon the set of interrogatories that is first put in before them, and no new ones can be examined upon before them, without leave of the court, because their commission is to examine upon such interrogatories as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission, which now come in the room of those formerly annexed; and it is presumed that there has been a discovery made of the proofs, when the party is desirous to examine upon a new set of interrogatories.

Gilb. Chan. 126.

But before the examiner, the party may examine upon a new set of interrogatories, because that is presumed to be the examination of the judge, and the judge may examine upon interrogatories *ex re nata*, out of the articles; besides, the examiner is at the peril of his office, to make no discovery of the proofs.

Ibid. 117.
Prec. in

Chan. 386. Eq. Cal. Abridg. 233. Andrews and Brown.

Of the Execution of the Commission, and herein of the Conduct to be observed, and the necessary Acts to be done by the Commissioners at the Time and Place of Meeting.

THE commissioners and witnesses having met at the time and place appointed by the notice for the execution of the commission; the commission (which till that time must remain sealed) may be opened, that the commissioners may see their authority; and this being done, they then administer the oath to each other, and afterwards to the clerks who are employed in taking, transcribing or engrossing the depositions of the witnesses to be examined. The forms of these oaths are printed on parchment, and are always annexed in schedules to the commission: and it is irregular for the clerk of the solicitor in the cause, to write as clerk in the execution of the commission, and the court has in such case suppressed the deposition: one commissioner attending on each side is sufficient; but to obviate any inconvenience which may arise in case no commissioner attends on behalf of the adverse party, the party proceeding under, and having the carriage of the commission, must procure the attendance of his own or any other two commissioners; for no less than two in number, can proceed upon and return the commission.

Chan. Caf.
393.

If two of the plaintiff's commissioners attend at the time and place appointed for the execution of the commission, they may proceed therein *ex parte*, if the defendant's commissioners do

not attend. But if the defendant's commissioners attend at the time and place appointed, and the plaintiff's commissioners are not there, *they* cannot go on, because the plaintiff having the carriage of the commission will not produce it if he is disappointed of his commissioners, and consequently there can be no proceedings for want of the commission; this makes a duplicate of the commission more necessary, for in that case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but where there is no duplicate, and the defendant's commissioners attend at the time and place appointed, and none appear for the plaintiff, the party aggrieved is to be recompensed in costs, upon complaint made thereof to the court; and in that case the court will give him leave to sue out another commission, and order him the carriage thereof.

Gillb. Chan,
136.

If notice be given of executing the commission, and at the day appointed the commission is opened, and nothing done thereupon, and no adjournment made, the commission is lost, except the other side agree to adjourn or take new notice: but if the commission be not opened, and he who has the carriage thereof gives new notice, and then executes it, this is a sufficient execution, unless in the mean while the adverse party had obtained and served an order to stay proceedings till the costs of the former day be paid, and that they are not paid: so where only one commissioner on each side met, the plaintiff's commissioner went away without doing any thing, and so the commission was lost, the court ordered the plaintiff to pay the defendant his costs, and that there be
a new

Pract. Reg.
87.

a new commission, and the defendant to have the carriage of it: due notice being given, if the one side produces, and examines all his witnesses, and the adverse party does not, but prays a new commission; if it be granted, he that prays it shall bear all the charges of such renewed commission both in court and in the country, and as well for the charge and entertainment of the other's commissioners as his own: and the other side shall be permitted to cross-examine the witnesses produced by him that renews the commission: but if the other side will examine any other witnesses of his own, then he shall bear his own part of the charge: such charges to be ascertained by the oath of the party, or of him who disbursed the money for him.

Ord. Chan.
33.
Px. Alm.
17, 18.

Where the defendant joins in commission, if his commissioners do not attend, he shall never afterwards be permitted to examine, but the court will sometimes grant him that favour upon an affidavit of some reasonable cause of non-attendance, and that neither the party himself, nor any for him, or by his direction or knowledge, has seen, heard or been informed of the depositions taken, or any part of them, nor willingly will see, till he has examined, or till publication be passed; and in such case the court will order publication to be stayed some time.

Pract. Reg.
89.

One commissioner at least must attend on each side, for if the plaintiff hath but one commissioner that attends on his side, he cannot proceed to execute the commission, unless one of the defendant's commissioners attends, and joins with him therein: but if one commissioner for each party attends, they may proceed in the execution

execution of the commission, and not otherwise. Ibid. 136,
137.

The commission being opened and read, both parties are obliged then to exhibit their interrogatories, (if they intend to examine any witnesses,) and consequently, if the plaintiff exhibits his interrogatories, and the defendant neglects to do it, and yet by his commissioners attends the execution, whereby they have an opportunity of hearing and seeing every thing that is proved on the plaintiff's side; it often happens, that, having exhibited no interrogatories, the defendant will move for a new commission, upon a suggestion that he had no opportunity of examining his witnesses at the last commission: if it shall appear to the court by affidavit, or certificate of the plaintiff's commissioners, that the defendant's commissioners attended during the whole time of the execution of the commission, and never exhibited any interrogatories; in such case the court will very rarely, and never without some inquiry, grant the defendant another commission; and it will be incumbent upon the defendant to account satisfactorily to the court for such conduct on the part of *his* commissioners; for such a practice appears *prima facie* to be done with a view, by some indirect method to come at the knowledge of the substance of what the plaintiff has proved, and then at another commission to exhibit interrogatories adapted to such questions and points, as may tend to overthrow all that has been done: and a party shall never be admitted to have this unfair advantage over his adversary, for if he was, he might easily conceive what interrogatories to exhibit, which may answer his purpose; and therefore it is incumbent

The Practice of the

cumbent upon him at least to exhibit his interrogatories at the *execution* of a commission; but however, if interrogatories are exhibited, it is in the discretion of the court to grant or deny another commission, as the circumstances of the case upon affidavits, or the certificates of the commissioners appear.

And care must be taken, (if a new commission is granted,) that neither party add to or alter their interrogatories; they must examine upon the old interrogatories, which were exhibited at the former commission, and they are not to add any new ones, without the special permission of the court being previously obtained, which in fact is never granted but in extraordinary cases and under particular circumstances, and then the interrogatories are settled by a master.

Gillb. Chan.
138.

The oaths being administered, the commissioners and their clerks begin to execute the commission; and having before them the interrogatories both for the plaintiffs and defendants, the commissioners present must subscribe their names at the foot of each schedule of interrogatories respectively; and then one of the commissioners or clerks, draws up the style or title of the depositions, (preparatory to the examination of the witnesses,) upon paper, usually thus:

“ Depositions of witnesses produced, sworn and examined on *Monday* the 17th day of *July*, in the 29th year of the reign of his Majesty King *George* the Third, and in the year of our Lord 1789, at the house of *Mary Adams*, called or known by the name of the *Feathers*, situate in *Bridge-street*, in the city of *Chester*, by

virtue

virtue of a commission issuing out of his Majesty's high court of Chancery to us *Joseph Harding* and *John Bennet*, and others, directed for the examination of witnesses in a cause there depending between *Benjamin Atkyns* complainant, and *Jeremiah Stokes* defendant; we the acting commissioners under the said commission, and also the respective clerks by us employed in taking, writing, transcribing and ingrossing the said depositions, having first duly taken the oaths annexed to the said commission, according to the tenor and effect thereof, and as thereby directed, on the part and behalf of the complainant *Benjamin Atkyns*."

The commissioners then call a witness before them; and cause all persons but themselves and their clerks, and the witness that is to be examined, to leave the room. One of the commissioners then takes the interrogatories in his hand, and producing them to the witness that is to be examined, reads the title of them, and administers to him the following form of oath:

"You shall true answer make to all such questions as shall be asked of you on these interrogatories without favour or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth.
So help you God."

This form of oath may be varied as the case may require; and the substance turned into an affirmation for a witness, a professed Quaker.

Where a witness is produced, he must be first examined upon the interrogatories of the producer; and then forthwith, without suffer-

Cl. Tut. 15.
Pract. Reg.

ing him to go abroad, upon the cross interrogatories of the other side; and if a witness refuse to be cross examined, it is a cause of exception to his testimony; and the court, on motion, will suppress his deposition, *ex parte*, for it argues favour and partiality: but each party joining in, and attending the execution of, the commission, ought to exhibit interrogatories; for the court dislikes the practice of examining the defendant's witnesses upon the plaintiff's interrogatories *et sic e contra*.

The witness being sworn, his name and place of abode, addition and age, are to be written upon the same paper, under the title of the depositions: and the answer given by him to each interrogatory respectively, is likewise reduced into writing, thus:

“ *Joseph Southern* of the town of *St. Alban's* in the county of *Hertford*, aged fifty years or thereabouts, a witness produced, sworn and examined on the part and behalf of the complainant *Benjamin Atkins* deposeth, and saith as follows:

“ *Imprimis*, To the first interrogatory this deponent saith, that, &c.

“ *Item*, To the second interrogatory this deponent saith, &c.”

And so proceed through the rest of the interrogatories.

Com. Sol.
31.
Pract. Reg.
90.

The commissioners must themselves examine witnesses, and not leave so weighty an affair to their clerks or others: and they ought to examine them but to one interrogatory at a time, and not to read another to them till they have answered the former. And the commis-

sioners shall likewise take down what comes
 from the witnesses on their examination, and
 not permit them, on their own reading of the
 interrogatories, to set it down themselves; but
 the depositions must be carefully read over to
 the witness, or he should be permitted to per-
 use and consider what he has deposed; so that
 the commissioners may have the sense and
 meaning of the witness *ex re nata*, without be-
 ing tampered with; and if, upon such revision,
 any errors appear, or the witness upon recol-
 lection object to the statement, or perning of
 the depositions, the same must be rectified;
 and herein the commissioners should be very
 attentive. A witness may be allowed to use
 short notes, which he brings with him to assist
 his memory; but not the substance of his de-
 positions, nor may he transcribe such notes
verbatim: and the commissioners ought not to
 ask any idle questions, or such as are foreign
 to the interrogatories, nor set down impertin-
 ent answers, but only such as are material to
 the points interrogated.

Com. Sol.

31.

Pract. Reg.

99.

Com. Sol.

31.

Pr. Alm. 21.

Pract. Reg.

91.

Com. Sol.

31.

If any practiser, or other person, goes about
 to tamper with or suborn any witness, upon
 complaint made thereof, and upon examina-
 tion of the matter upon oath, he must stand
 committed: and if one commissioner obstructs
 another in his duty, or examines irregularly, he
 may certify such behaviour to the court without
 affidavit; but if complaint of any improper
 conduct in a commissioner is made by the par-
 ty injured, the same must be supported by af-
 fidavit, or the court will not notice it.

Gilb. Chan.

143.

The witnesses must severally subscribe their
 Christian and surnames, or marks, to the pa-
 per draughts of their respective depositions;

after which the examinations are to be engrossed, by the clerks attending, and sworn under the commission, upon skins of parchment, stamped with an half-crown stamp, each witness subscribing his own name to deposition thus engrossed: and the commissioners are to set their hands to each schedule or skin of parchment respectively, and to a certificate on the back of the commission, that the execution thereof is contained in a schedule or schedules thereto annexed; and the whole is to be closed up, and sealed with the commissioners seals, and to be delivered to a Master by one of them, or to be sent up to the court by any other person, who must make oath as on the delivery of an answer; and being so delivered, the examinations are not to be opened or copied till

Px. Alm. 19. publication be duly passed.

A witness on the part of the defendant was sworn, and having appeared before the examiner, was examined to several interrogatories, after which he was appointed by the examiner to come another day, but the next morning was suddenly taken ill and died; and it was moved at the Rolls, that this witness's depositions, so far as they were taken, might be made use of, which, without the order of the court, could not be, the witness not having signed his examination; but the motion was denied, for that the examinations were imperfect, and could not be made use of.

3 P. Will.
414.

It seems, after the witness is fully examined, the examinations are read over to him, and the witness is at liberty to amend or alter any thing, after which he signs them; and then (but not before) the examinations are complete and good evidence.

Ibid.

But

But yet where the defendant, after an order for publication, examined a witness, and then, first conceiving himself irregular in examining this witness, (it being after publication,) got an order (upon petition and an affidavit from himself, his clerk in court, and solicitor, that they had not, nor would see any of the depositions,) that he might re-examine the said witness; but before there could be a re-examination of the witness, he died: and upon affidavit of this,

Lord Chancellor *Parker* ordered, that the defendant might make use of the depositions taken of this witness, the re-examination of him having been prevented by the act of God. 1 P. Will.
414.

If any of the commissioners obstruct the others in their examination, or examine irregularly, such misbehaviour, or what else is necessary to inform the court of, must be certified in the return of the commissioners, without affidavit; because, being officers of the court, they are allowed to certify: But it seems as if the party wishing to avail himself of such certificate, must make an application, supported by affidavit, of the fact; otherwise the court will not take notice of the commissioners certificate alone, because they are appointed for another purpose, and are not to certify, but of necessity: And where commissioners of one side certified irregularity, and both or one of the other side made affidavit, the court ordered the adverse commissioners also to make affidavit; for the court in such case will order what shall be thought necessary for discovery of the truth of the fact.

Px, Alm. 19.

A commissioner certifying falsely that a witness was examined upon oath, and sworn, who

Cro. Eliz.
623.

never was examined, is a great fault, and fineable.

Com. At.
432.
Toth. 39.

Toth. 40.

Cary's Rep.
43.

Where there is a disagreement among the commissioners in the execution of the commission; or where there is any other special cause that obstructs the execution of it, the court will send down an examiner into the country; and the court will sometimes make orders touching the partiality and practice of the commissioners; so where commissioners on the one certified partiality in the other, the court seemed unwilling to take any notice of it; saying, let them certify the matter committed to their charge; and if there be misdemeanour, let the party injured make affidavit thereof.

A joint commission issued to examine on both sides, directed to three, four, or two commissioners; three met and examined witnesses, and appointed a new day to examine more: the defendant's commissioners took up the commission, carried it away, and came not at the day appointed: the plaintiff's came and examined witnesses, without having the commission, and certify these with the former depositions taken, and the whole matter.

Pratt. H.

Chan. 115.

The court ordered the depositions certified to be sealed up again, and remain in court; and awarded a *subpœna ducens tecum* against the commissioners to bring in the commission; and thereupon the court would make further order.

If a commissioner be examined as a witness, at the execution of a commission to examine witnesses, he must be examined by the other commissioners, as well previous to his acting as a commissioner, as also before any other witness be examined: and after his examination,

tion, he may join and proceed in the execution of the commission with the other commissioners; for if other witnesses be examined previous to the examination of a commissioner, and in the presence of that commissioner, the examination under such circumstances would be irregular, the commissioner having heard the former examination. The depositions of a commissioner who had so acted, and was afterwards examined in court, were suppressed upon motion.

Cl. Tut. 29.

So if a clerk, who writes for the commissioners, be examined as a witness, his examination must precede the examination of any other witness, except a commissioner under the same commission.

1 Vern. 309.
Gibb. Chan.
133.

A special commission was granted to examine the quantity and value of certain oar, &c. the Six Clerks appointed time and place. And *per Curiam*, the time and place is only for the first meeting of the commissioners; but afterwards they may adjourn to another time, or another place: but it is usual when an adjournment is made, to make a *memorandum* thereof, which the commissioners sign: and if a commission be adjourned to another day and place, and witnesses are examined, the time when, and the place where such examinations were taken, ought to be mentioned and set down in the title of the respective depositions; because, in an indictment for perjury in deposing falsely before commissioners, it seems essential to state the time and place; for, *prima facie*, it must be intended where the title of the depositions imports.

1 Cha. Caf.
282.

Praet. Reg.
91.

Ibid. 92.

He, at whose instance a commission is renewed after a former commission executed and returned,

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Ord. Chanc.

133.

Ex. Alm. 18.

Com. Sol. 3.

returned, and he, by the default of whom, or of his commissioners, a former commission was not executed, and is thereupon renewed, shall at his peril examine all his witnesses on that renewed commission, or shall examine them in court by the end of the term it is returnable, without any more or further delay; and where publication is passed, no commission to examine can be granted or renewed without special order.

If the plaintiff or his commissioners abuse the carriage of the commission, by making unnecessary adjournments, or an irregular examination of witnesses, that may intitle the defendant to a commission of his own and the carriage of it.

Sometimes books, deeds, or papers, are produced at the execution of a commission in order to be proved pursuant to notice, or the compulsory process of *subpœna ducens tecum ad testificandum*: and after such deed, &c. is proved, the same may be, and usually is made an exhibit in the cause; and for that purpose the following indorsement (without which it cannot be read in court), containing the title of the cause, &c. is written upon the exhibit produced, two or all of the acting commissioners before whom the same was proved, subscribing their names to the indorsement, thus:

“ In Chancery,

Between *Jacob Morrison*, plaintiff,
and

John Legh, defendant.

“ 16th July 1789. At the execution of a commission for the examination of witnesses in this cause, this *paper writing* was produced and shewn to *Matbias Harman*, gentleman,

man, a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf; and was also produced and shewn unto, &c. a witness, &c. before us,

*John Williams,
James Owen."*

When the witnesses are examined, the depositions are to be ingrossed on parchment, and examined carefully with the paper draughts; and when the ingrossment is upon examination found to be a true copy of the original depositions, two (but generally all) of the acting commissioners subscribe their names to each skin of parchment. If more than one, the interrogatories and depositions thus ingrossed upon parchment, and signed by the acting commissioners, as before mentioned, are to be annexed to the commission with the schedule of oaths; and a return is then indorsed upon the commission, near the middle, thus:

"The execution of this commission appears in a certain schedule (or schedules, if more than one) hereunto annexed.

*John Williams,
James Owen."*

This return is made by two or more (generally all) of the acting commissioners, who severally subscribe their names thereto in the manner and form above specified.

The commission, together with the oaths, interrogatories, and depositions annexed, must be then folded up, so that no part of the ingrossment or writing may be read; and being neatly

neatly and carefully folded up, and bound up together with red tape or string, in such manner that the label only of the commission may appear to view, and hang out therefrom, the acting commissioners set their seals in the several meetings or crossings of the tape or string; and upon some place on the outside of the commission, they subscribe their names. The commission being thus executed, and made up, the paper draughts of the depositions of the respective witnesses for each party should be sealed up carefully, and delivered to some of the acting commissioners for safe custody. These paper draughts are sometimes divided into two parts, and the parts so divided interchangeably kept by the commissioners for the respective parties; or, which is more usual, the plaintiff's and defendant's commissioners, alternately, keep the draughts of the adverse party's witnesses, and take care that no person see them until publication pass in the cause, consistent with their oath, and the rules and orders of the court.

The commission thus made up, with the label hanging therefrom, must be delivered by one of the commissioners personally into the hands of the clerk in court making out the commission, or his agent at his seat in the Six Clerks office; or it may be delivered by one of the acting commissioners into the custody of a careful person, with directions to carry and deliver the same into the hands of the clerk in court personally, or of his agent at his seat in the Six Clerk's office; cautioning the person entrusted with the carriage of the same to keep it very carefully and unopened. The clerk in court making out the commission, and to whom it is directed

directed to be delivered, as soon as the commission arrives, and previous to its being received by him, takes the bearer (not being a commissioner in the commission) to the sitting Master at the public office, or any other Master in his absence, before whom the bearer must make oath, "That he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened or altered since he so received it." An indorsement thereof is then made upon the commission, thus :

" 8th November 1789.

" Upon the oath of *Ambrose Lloyd*,
before *John Hett*."

The clerk in court, or his agent from his seat in the Six Clerk's office, takes the commission from the public office, and brings it to his seat in the Six Clerk's office, and keeps it unopened until publication pass in the cause.

If a commissioner brings the commission, no oath is required of him, and the indorsement upon the commission then is,

" 8th November 1789. Received by the hands of *James Owen*, gentleman, one of the commissioners."

The person bringing the commission is always allowed 5s. for his trouble, or if the distance be considerable, a charge is made accordingly, and the full and reasonable expence actually paid, is always allowed upon a taxation of costs.

The acting commissioners are always allowed *one guinea per diem*, during the execution of

of the commission, exclusive of every other expence incident thereto; and a *quantum meruit* lies for suing as a commissioner upon a commission to examine witnesses, though it was objected, he acted by the command of the court; *sed non allocatur*; because he is appointed by the nomination of the party, who ought to pay him, if he employs him.

2 Salk. 370.
Carth. 208.
Comb. 186.

The clerks of the commissioners are in like manner intitled to *half a guinea per diem*; and the expences and charges of entertainment, and other matters, are borne by the parties joining in and attending the execution of the commission. The expences of the witnesses are always to be paid by the party producing them, before they give evidence, if required.

Gillb. Chan.
128.

The expences of a commission to examine witnesses will be very disproportionate; where one party examines *twenty* or *thirty* witnesses, and the other party *half a dozen* only, the expence of keeping open the commission for the examination of so many witnesses, becomes then very expensive; and were those expences to be borne equally, great hardships would be done to one of the parties. However, any difficulty of this nature may be obviated by each party *at the commencement*, and during the execution of the commission, keeping his respective commissioners, clerks and witnesses, separate and apart from those of the adverse party's; and by thus saving the general expence of the commission, the enormous expence and extravagance of keeping open the commission wantonly, or of examining immaterial witnesses, and by such sinister practices protracting the execution of the commission, at a very heavy, and perhaps ruinous expence, will

will be thrown upon the party who so misbehaves; and this method seems adviseable in all cases where any suspicions are entertained of such conduct. A witness cross-examined at the execution of a commission thus conducted, may be either at the joint expence of the parties examining him originally, and cross-examining: but if a party insists upon cross-examining a witness, (which he may do,) and needlessly defers the cross-examination, and detains the witness for several days for that purpose, the party examining such witness originally may pay the witness his expences and charges up to the conclusion of his examination originally: and the expences of his detention for cross-examination incurred afterwards, must be paid by the party detaining him for cross-examination.

If a commissioner refuse to sit, the suitor has no remedy by action against him; and though perhaps his refusal will be a contempt to the court, if without excuse, yet doubtless they will not punish the person for it, unless his reasonable expences be allowed.

No commission to examine witnesses can be executed in term-time, without *leave of the court*; and to obviate all inconveniencies which may eventually arise in the execution of a commission, it seems adviseable in all cases to engraft upon the application for a commission to examine witnesses in *England or Wales*, "Leave to examine in term-time."

Show. 343.

If a commission becomes void by error of the clerk in making it, the costs shall be borne by him, and that side for whom it was taken out, and who had the carriage of it: so where exhibits of writings were alledged to have been

Com. Sol.

30.

1 Chan. Caf.
273.

altered and interlined since the commission to examine witnesses executed, the court granted a commission to examine this matter.

If a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition in the usual manner for that purpose; this order is of course, and must be served on the adverse party's clerk in court, by leaving a true copy of such order with the clerk in court *personally*, or with his agent at his seat in the Six Clerk's office, shewing, at the time of service, the original order passed and entered. A defendant may obtain a like order to examine a co-defendant as a witness; but all these orders proceed upon a suggestion, that the defendant is not concerned in point of interest in the matters in question; and they are never granted without a clause of saving just exception to the other side; and if there is any exception to the evidence of the defendant as a witness, it must be made at the hearing of the cause.

This order for examining a defendant as a witness, must be produced at the execution of the commission, or at the examiner's office, or wherever the examination is to be taken, where the defendant attends to be examined, without which he cannot be examined: for it is by virtue of that order, and the authority given to them by the court, the commissioners or examiners are empowered to examine a defendant, and without the actual production of the original order regularly passed and entered, they must not presume to examine a defendant: after the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission

to examine witnesses in order to falsify the defendant's examination, this tending to multiply causes, and to make them endless. ^{3 P. Will. 413.}

And if, after a cause is at issue, the plaintiff desires the defendant may be sworn and examined upon interrogatories as a witness, he must ordinarily stand to the defendant's depositions as conclusive, else the court will not compel the defendant to be examined: but if ^{2 Px. Alm. 79.} some new act be done by the defendant after issue joined; as, making a feoffment or release by covin, or such like, he may compel the defendant to be examined without being concluded: and when it was moved that the defendant, who had not sworn fully by his answer, might be examined upon interrogatories upon an account decreed (the plaintiff for saving expences not having excepted to his answer,) the court inclined to grant it, but there wanted notice. ^{Ibid. Pract. Reg. 167.}

After a decree inrolled, in which was no order to examine the defendant upon interrogatories, the court would not order him to be examined to the discovery of deeds. ^{2 Chanc. Rep. 10.}

Of the Examinations of Witnesses by Examiners in Court.

THE office of the examiners is to examine upon oath the witnesses on both sides that are brought before them in any cause, as also parties in contempt, and to put their depositions and answers to the interrogatories into writing; they are appointed by the Master ^{Pract. Reg. 157.} of

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of the Rolls, and their office is kept at the Rolls, and commonly executed by deputies.

The form of the oath taken by them is thus :

“ You shall swear well and truly, according to your skill and ability, to exercise and occupy the office of an examiner in the King’s court of Chancery, whereunto you are admitted ; and duly, justly, and equally, you shall examine their causes, that shall be committed unto you, without any favour or corruption, and without any fee or reward, of any person or persons to be had, otherwise than shall of right appertain concerning the same : and you shall be attendant as well to further the King’s business, as the same causes, from time to time, as need shall require ; and you shall not publish or shew the same depositions to any person before publication in the court, without warrant of the same court.”

Ord. Chan.
254.

The examiners (by their deputies commonly) examine upon oath the parties in any suit, and witnesses produced on either side ; and put their answers and depositions made to interrogatories into writing, which they are to keep close and private till publication : but the witnesses or parties must be sworn before a Master to answer truly to the interrogatories, and the names of those who are sworn, must be inserted by the Master in the interrogatories, and then they may be examined.

Pract. Reg.
153.

Ibid. 159.

By order of the court, which well knows the consequence of good examiners, and how much depends thereon, the examiners (in whom the

the court repose much confidence) are themselves *in person* to be diligent in the examination of witnesses, and not entrust the same to mean and inferior clerks; and are to take care to hold the witnesses to the point interrogated, and not to run into extravagancies and matters not pertinent to the questions.

Ord. Chanc.
120.

The examiners are to take care they employ under them none but persons of known integrity and ability, who shall take an oath, not to deliver or make known, directly or indirectly, to the adverse party, or any other, save the deponent who comes to be examined in any of the interrogatories delivered to be examined upon any examination by him taken, or remaining in the examiner's office, or an extract, copy or breviate thereof, before publication be thereof passed, and copies thereof taken: and if any such deputy, clerk, or persons employed, shall be found faulty in the premises, he shall be expelled the office, and the examiner who so employed him shall be also answerable to the court for such misdemeanor, and to the party grieved for his costs and damages sustained thereby: and such solicitor, or other person who shall be discovered to have had a hand therein, shall be liable to such censure for the offence as the court shall find just to inflict upon him.

Ibid. 129.

An examiner's clerk was suspended for intrusting one who was not sworn clerk of the office, to transcribe part of the depositions of a witness, before the witness had perfected her examination, or publication was passed in the cause.

Ibid. 215.

The circuit within which the examiners have exclusive right of examination, seems somewhat

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what undefined, unless the subsequent orders of Chancery, made by Lord *Clarendon* and Sir *Harbottle Grimstone*, may be said to have virtually annulled the precedent orders, according to the rule of law, that *leges posteriores priores abrogant*. It appears from two orders made the 3d *November*, 11 *Car.* 1636, and 15th *October* 1651, occasioned by differences between the six clerks and examiners, stating, among other abuses and encroachments, the taking out and executing commissions in or about *London*, contrary to the known rules and practice of the court, that *no commission should be executed in, or within twenty miles of London*, as alledged by the examiners. Lord *Keeper Coventry*, upon the first of these orders, declined making any decision, and ordered precedents to be searched. The second application underwent a similar fate from the *Lords Commissioners*. The matter being thus left open, and undetermined, Lord *Clarendon* and Sir *Harbottle Grimstone*, after great deliberation, and with a view to reform and correct the abuses crept into the practice of this court, defined the exclusive right of examination by the examiners, by making an order, "That no commission *ad examinandum testes*, be executed in *London*, or within ten miles thereof, without special order first obtained, upon affidavit made of the party's inability to travel, or other good matter; and that all depositions taken by commission in *London*, or within ten miles thereof, without special order as aforesaid, shall stand suppressed and superseded *ipso facto*, and not allowed to be read in evidence at the hearing of the cause: and the parties who shall cause the same to be executed, shall suffer

suffer such punishment for their contempt and irregularity as the court think fit."

A practice in contradiction to the words of this order has for many years prevailed, few or no commissions to examine witnesses being now executed within twenty miles of *London*; for the heavy expence attending the examination of witnesses by commission, principally incurred by the extravagant entertainment of the commissioners and witnesses, seems to be an argument in favour of this practice; and as a saving of expence is or ought to be an object in the prosecution of every suit, so the examination of witnesses should be at the examiners office, in all cases where it can be done with convenience and at less expence than by commission. The examination then at the examiners office of all witnesses *resident within twenty miles of London*, in exclusion to the examination by commission within that district, has by long use and acquiescence ripened into an established practice; and with a view to prevent the improper use of commissioners so near *London*, it were much to be wished the court would by some future order adopt and confirm it.

The parties being at issue, proceed to examine witnesses; and the interrogatories being perused with care that the same be pertinent, and only to the points necessary, the witnesses are to be sorted, and examined on those interrogatories only that their testimony doth extend unto, without the needless interrogatory of matters unnecessary or immaterial, as well to avoid the charge of both parties, plaintiff and defendant, in superfluous examinations, as to apt interrogatories (which are the life of the cause) may be exhibited.

No witness shall be examined in court without the privy of the adverse party, to whom the party so to be examined shall be shewn, and notice of his name and place of abode delivered in writing by those that shall produce him to the adverse party's clerk in court: and the examiner is to take care and be well satisfied, that such notice be given; and then shall add to the title of such witnesses examination, the time of such notice given, and the name of the person by and to whom it is given, that at the hearing of the cause, the suitor be not delayed upon pretence of want of notice.

Px Alm.
20.
Ord. Chan.
126.

When any witness shall be brought up to any clerk in court, to be shewn before he be examined, the party that produceth him, shall not only leave a note in writing of the name and title of such witness, and the parish where he lives; but if such parish shall happen to be any of the parishes within the bills of mortality, such note shall also contain what street and house in such parish such party lives, and whether he be a housekeeper or a lodger, to the end such witness may with the more ease be enquired after, and cross-examined, if required; and the clerks are to take care to see this order performed.

O.d. Chan.
164.

If a party examines some witnesses in town, and others by commission, he is not obliged to file his whole set of interrogatories in the examiners office, but such alone as he has occasion for in town; but they must be the same as were exhibited at the commission, or else it would be paying for copies of whole interrogatories twice over.

When a witness residing in, or within twenty miles of *London* is to be examined, interrogatories

ories properly engrossed are first to be left with some one of the examiners, at his seat in the examiners office: and where a witness attends to be examined, a clerk from the examiners office accompanies the witness to the public office to be sworn to the interrogatories before the sitting Master there, or before any other Master out of office hours; the oath is administered in the usual manner, the form whereof is as follows:

“ You shall true answer make to all such questions as shall be asked of you, or these interrogatories, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth.

So help you God.”

A *jurata* stating the producing and swearing of the witness to the interrogatories with his name, the day and year when sworn is inscribed upon the interrogatories, to which the Master before it is sworn subscribes his name.

The witness, previous to his examination, must be produced in person, and shewn at the seat of the adverse clerk in court, in the Six Clerks office, and a note in writing of his name and place of abode left at the clerk in court's seat: this is done as well to prevent witnesses from being personated, as to give an opportunity for cross-examination; the witness thus sworn, and produced at the clerk in court's seat, returns back to the examiners office and is then examined. After the witness is fully examined, the depositions are read over to him, and the witness is at liberty to amend or alter any thing, after which he signs them, Ord. Chan;
126.

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and then (and not before) the examination is complete and good evidence.

The clerk in court at whose seat the witness is produced, sends the note of the name and residence of the witness to his client, and if it be necessary to cross-examine that witness, and cross interrogatories for that purpose be filed, the party producing the witness is obliged to procure him to stay, or return to be examined: but it is usual after the witness is sworn, for the examiner to appoint some other day for him to attend to be examined; and to prevent the examination being taken unknown to the other side, a note in writing may be fixed up in the examiners office, that if *such a person* come to be examined *in such a cause*, let him be cross-examined; or the examiner may be instructed to take care that the witness be cross-examined, which seems the better method: but where the interrogatories for cross-examining a witness are not filed, or the witness is not required to be cross-examined whilst he is under original examination, but is permitted to depart about his business, the party who intends to cross-examine that witness, must procure his examination in the best manner he can: the adverse party is not bound to produce him again, to attend to be cross-examined, since it was the party's own fault he had not the cross interrogatories ready, whilst he was under the original examination.

If a witness be examined by commissioners in the country, he shall not be examined again in
 Cl. Tut. 15. court without a special order for that purpose.

The examiner is to examine the deponent to the interrogatories *seriatim*, and not to permit him to read over, or hear read, any other interroga-
 tory

tory till that in hand be fully finished, that by this means the truth may not be eluded or concealed, which it might more easily be, if a witness knew every question that would be asked him, before he answered any; much less is he to suffer the defendant to have the interrogatories, and pen his own depositions, or depart after he hath heard an interrogatory read to him till he hath perfected his examination thereto.

Ord. Chan.
128.

And if any witness shall refuse to conform himself, the examiner is to give notice thereof to the clerk on the other side, and to proceed no further in his examination without the consent of the said clerk, or order made in court to warrant him in so doing.

Ibid.

The examiner shall not examine any witnesses to invalidate the credit of any other witness, but by special order of court, which is to be sparingly granted, and upon exceptions filed with the examiner, (without fee,) and notice thereof given to the adverse party or his clerk, together with a true copy of the exceptions at the charge of the party so *examining*: and in examining witnesses, the examiner shall not use any idle repetition or needless circumstances, nor set down any answer to the question to which the examinant cannot depose, otherwise than thus: "*To such interrogatory this deponent cannot depose;*" and if such impertinences be observed by the court, the examiner is to recompense the charge thereof to the party grieved as the court shall award: no re-examination of a witness, though upon the same interrogatory, and that he spoke uncertainly on the first examination, is to be without leave and order of court.

Ibid. 130.

Pract. Reg.
165.

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The examiner is not strictly bound to the letter of the interrogatories, but ought to explain every other matter or thing, which ariseth necessarily thereupon for manifestation of the whole truth; and so where I H, and another were commissioners to examine defendant upon interrogatories drawn by plaintiff, and defendant being examined would have declared the whole truth, which I H, being a commissioner chosen by plaintiff, would not suffer him to do, but held him strictly to the interrogatories, so that the truth could not appear. And *per totam Curiam*: It is a great misdemeanour, and a murdering of the truth and right, as the statute of *Exeter* speaks, *et per quod justitia et veritas suffocantur*, as it is said *in capite itineris*: and commissioners ought to be indifferent, and by all means to express the truth; and they are not strictly tied to the words of the interrogatories, but to every thing also which necessarily ariseth thereupon, for the manifestation of the whole truth concerning the matter in question: and for this misdemeanour, the Attorney General was ordered to prefer an information against him.

In Cam.
St-II.
9 Rep. 70.
Peacock's
case.

The depositions of a witness who was examined *in perpetuam rei memoriam*, were suppressed on petition, after his death, and the examiner discharged, and committed for foul practice and irregularity in taking them, the plaintiff being suffered by the examiner to instruct him.

Mosely, 327.

The examiner, after the examination begun, ought not to confer with either party touching the examination, or take new instructions touching the same: and forasmuch as the witness by his oath, which is so sacred, calleth Almighty God (who is truth itself, and cannot be deceived,

deceived, and hath knowledge of the secrets of the heart) to witness that which he will depose, it is the duty of the examiner gravely, temperately, and leisurely, to take the depositions of the witnesses, without any menace, disturbance, or interruption of them, in hindrance of the truth, which are grievously to be punished: and after the depositions taken, the examiners ought to read the same distinctly to the witnesses, and suffer them to explain themselves for the manifestation of the whole truth.

4 Inst. 478.

Note; The mode of examination prescribed by the rules and orders of the court for the examination of witnesses at the examiners office, should be observed by the commissioners at the execution of a commission to examine witnesses.

When there is reason to suppose a witness will not *voluntarily* attend to be examined, recourse must be had to the compulsive process of a *subpœna ad testificandum*, which commands the witness to whom it is directed, laying aside all pretences and excuses, to appear before the examiner, to testify on the behalf of the party requiring his testimony.

To obtain this writ, a *præcipe* must be left at the *subpœna* office, in the following form:

"*Peter Bailey* to appear in Chancery, returnable immediate, to testify on the behalf of *Abraham Jordan*.

Bevan, solicitor.

Tested 12th July 1789."

This *præcipe* being left at the *subpœna* office, the writ is made out in the following form, which, when sealed, the solicitor calls for at the same office.

Sub-

Subpæna to testify before the examiner.

“ George the Third, &c. To Peter Bailey, greeting: For certain causes offered before us in our Chancery, we command and strictly injoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before us in our Chancery, immediately after the receipt of this writ, wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you; and to do further and receive what our said court shall have considered in this behalf; and this you may in no wise omit, under the penalty of one hundred pounds; and have here this writ. Witness ourself at *Westminster*, the 12th day of *July*, in the 29th year of our reign.”

Indorsed, “ By the court, to testify on the behalf of *Abraham Jordan*.”

Label. “ *Peter Bailey* to appear in Chancery, returnable immediate, to testify on the behalf of *Abraham Jordan*.”

This writ appoints no time or place whither the witness is to resort for examination; it is therefore necessary to serve him with notice in writing, appointing the time and place of examination; this notice should accompany the service of the *subpæna*, which notice may be in the following form:

“ In Chancery.

“ Mr. *Peter Bailey*,

“ Take notice, that by virtue of a writ of *subpæna*, issuing out, and under the seal of the high court of Chancery, to you directed, and
herewith

Herewith shewn, (or left,) you are hereby required to appear personally before *John Henry Bateman*, one of the examiners of the said court, on *Monday* the 15th day of *July* instant, by ten of the clock in the forenoon of the same day, at the examiners office, in the *Rolls yard, Chancery-lane*, in the county of *Middlesex*, to certify the truth, according to your knowledge, in a certain cause now depending between *Maurice Salusbury*, Esq. plaintiff, and *Philip Broster*, Gent. defendant, on the part of the said defendant. Dated the 8th day of *July* 1789.

This must be adapted to the service of the writ, whether by delivery of the body under seal, or a label shewing the body under seal at the time of service of the label.

" To Mr. *Peter Bai-* { *W. H. Bevan*,
ley, at { Solicitor for the said
defendant."

The service of this writ should be a reasonable time before the day appointed for the examination of the witness, but no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor, if he appear, is bound to give evidence, until such charges are actually paid him, except he reside within the bills of mortality, and is summoned to give evidence within the same.

A witness thus served with *subpœna* to testify, and notice as before stated, if he neglect or refuse to attend to be examined, a certificate of the interrogatories being filed, and that the witness has not attended to be sworn to the interrogatories, must be obtained from the examiner, and an affidavit made and filed (at the affidavit office) of the personal service of the *subpœna* to testify, and notice in writing delivered at the same time: an application is next to be made by motion of course, in court, that the witness do at his own expence attend, and be

sworn and examined in four days, or that he may stand committed to the Fleet prison.

The court upon hearing the certificate and affidavit of service read, will make an order upon the witness that he attend the examiner, and be examined to the interrogatories filed, in four days after personal service of the order, or in default that he stand committed to the Fleet prison: the counsel's brief being left at the register office, the order will be drawn up, and being passed and entered at the same office; a copy of the order so passed and entered must be personally served upon the witness, shewing the original order at the time of service; if the witness obstinately persist in such neglect or refusal to attend, an affidavit of the personal service of the order must be made and filed, and a certificate procured from the examiner, that the witness has not attended to be sworn to the interrogatories; the court upon a further application by motion of course will make an order for the commitment of the witness to the Fleet prison; the affidavit of personal service of the former order and the certificate from the examiner being read in court at the time of the motion.

The counsel's brief on the motion being left at the register office, and the order thereon drawn up, passed and entered at the same office, the order itself must be delivered to tipstaff attending the court, who will thereupon procure a warrant from the Chancellor's secretary, and being instructed as to the person and residence of the witness, will apprehend and carry him to the warden of the Fleet prison; where he will remain in custody, not only until he has been examined upon the interrogatories, but
also

also until payment of costs to the party requiring his testimony, to be taxed by a Master, and likewise the tipstaff's and warden's fees for taking and detaining him: a witness thus dealt with, after he has put in his examination to the interrogatories, upon motion or petition, tendering or paying all costs, and certificate from the examiner of the examination being taken and complete, will be discharged by the court.

Note; the like method is to be pursued against a witness, who is sworn to the interrogatories, and afterwards refuses or neglects to attend the examiner to be examined thereupon.

If a person whose testimony is material on the behalf of any party to a suit, be confined in prison, within twenty miles of *London*, the situation of the witness must be represented to the sitting Master at the public office, or any other Master in his absence, requesting the Master's attendance at the prison, before whom the witness may be sworn to the interrogatories. A notice in writing specifying the title of the cause, the name and place of confinement of the witness, and the party's intention of examining that witness *on such a day*, must be served upon the adverse clerk in court, by leaving a copy of such notice with the clerk in court personally, or with his agent, at his seat in the Six Clerks office, two days previous to the examination of the witness, in order to give the adverse party an opportunity of cross-examining that witness, if he should be so advised: the examiner (with whom the interrogatories for the examination of the witness should be previously left) must be informed of the time and place when and where the Master will attend; the examiner usually accompanies the Master,

The Practice of the

Master, bringing with him and producing the interrogatories filed in the examiners office, and the witness being sworn thereto in the common form, the examination is taken in the usual manner, and the depositions and interrogatories returned by the examiner to the office, to be kept, as in ordinary cases, till publication pass in the cause.

In like manner, a witness residing within twenty miles of *London*, incapable by sickness of attending the examiners office to be examined, is attended at his place of abode by the Master, to be sworn to the interrogatories, and by the examiners to be examined: a notice in writing of the title of the cause, the name and place of abode of the witness, and the day and place where the witness is intended to be examined, and on whose behalf, must be served upon the adverse clerk in court personally, or left at his seat in the Six Clerks office with his agent, two days previous to the examination of such witness, to give the other side an opportunity of cross-examining the witness, if thought necessary.

Publication.

Publication.

PUBLICATION, in the legal sense of the word, is a power or liberty which is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or order of the court, to shew the depositions openly, and to give out copies of them. Pract. Reg.
297.

And, first, publication may pass by *consent*: When both the plaintiff and defendant have examined their respective witnesses, and are prepared to go on hearing of the cause, the clerks in court on both sides may pass publication by consent, which is done by subscribing their names respectively, to a consent in writing, to be entered in the house-books in the Six Clerks office, and thereupon publication immediately passes.

Secondly, Publication may pass by *rule*. When the cause is at issue, and one of the two adverse parties has examined *his* witnesses, but the other has neither examined *his*, nor had a commission for that purpose, the former is to give the latter a rule to produce his witnesses, and upon the expiration of that, another rule to pass publication; upon which he (the latter) may, by motion or petition, obtain an order to enlarge publication, and to examine his witnesses, if resident in town, or within twenty miles of it, in the examiner's office; if resident in the country, a commission to examine: if he does neither, a third rule is given him to shew cause that day seven-night why publication should not pass; which, if he does

Pract. Reg. not shew at the proper time, publication passes
298 accordingly.
Pr. H. Ch. 16, 17.

So where witnesses are examined in court, the clerks in court may give each other rules for publication, viz. first, an ordinary rule to produce witnesses, and upon the expiration of that, another rule for a day to shew cause why publication should not pass; and no cause being shewn at the time limited, publication passes accordingly: but if the witnesses are examined on both sides, upon a commission, one rule only is given; and the day given by such rule is a week, which being expired, and no good cause shewn to the contrary, publication passes.

Ord. Chan.
130.

Ibid.

Thirdly, Publication may pass by *order*, and that is, where a rule is given to pass publication, and afterwards, before the expiration of the rule, the same is enlarged for a certain time by order: where the time limited by the order is expired, publication passes in consequence of such order.

All rules * expire that day seven-night from the day on which they are entered: and they are entered with the register in the following manner, together with the date when entered, and the clerk in court's name who enters the same subscribed to them, but they are to be entered in term-time only, provided they be entered eight days before the expiration of the term, otherwise they must be entered in the ensuing term.

* Note; The general orders of the court are sometimes called rules of the court; but what is generally called a rule seems to be a particular order of course, founded upon some general order, or the common course of the court, entered without petition or motion, touching the ordinary proceedings in a cause; as to answer, join in commission, to reply, to rejoin, to produce witnesses, to examine them, and such like, Pract. Reg. 326.

9th November 1789.

Lee
v.
Harrison. { A day is given to the defendant
(or plaintiff) to produce witnesses.
BARKER, clerk for plaintiff.

16th November 1789.

Lee
v.
Harrison. { A day is given to the defendant
(or plaintiff) to shew cause why pub-
lication should not pass.
BARKER, clerk for plaintiff.

20th November 1789.

Lee
v.
Harrison. { A day is given to the defendant
(or plaintiff) for passing publication
upon a joint commission returned.
BARKER, clerk for plaintiff.

Wilding
v.
Coates. { We consent that publication do
forthwith pass.
RADCLIFFE, clerk for plaintiff.
BARKER, clerk for defendant.

And note, these rules must also be entered in the house-books in the Six Clerk's office, belonging to that division *where the cause originally began* (although the clerk in court who enters the rule should be of another division), and a copy thereof is transcribed into the rule-book of the clerk in court entering the rule: the sworn clerk's rule-book is then taken to the register office to have the rule entered; then the register makes the entry by setting his initials against the rule in the margin of the

book, for which 1 s. 6 d. is paid to him; and then notice of the entry of the rule is given in writing to the adverse clerk in court.

To. h. 22.

Pr. H. Ch.
17.
Pract. Reg.
298.

The cause being at issue, either party, plaintiff or defendant, that has examined his witnesses, and is desirous that publication should pass, may give these rules; and these respective rules are proper to be given, as well where no witnesses are examined on either side, to preclude the adverse party from examining, as where witnesses are examined in court or *ex parte* by commission.

Ibid. 297,
298.

When any of the depositions are taken by the examiner, a copy of the rule to pass publication, or a copy of the order to enlarge it, should be served upon him or his deputy at the examiner's office, as well to authorise the examiner to give out copies of the depositions, and to preclude any further examination in case a party wants to speed his cause on to a hearing, as also to prevent the examiner delivering out copies of the depositions, when a party has any more witnesses to examine: for otherwise the examiner, after the expiration of the rule, or order, at the request of either party, must pass publication by delivering out copies of the depositions: so where the depositions are taken by commission, and returned into the Six Clerks office, from whence the commission issued, the order to enlarge publication being served upon the adverse clerk in court, in whose custody the depositions are, by leaving a copy of the order with him *personally*, or with his agent at his seat in the Six Clerks office, shewing, at the time of service, the original order, passed and entered; on the expiration of the rule, or the order to pass or enlarge publication, the clerk

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in court, so having the custody of the commissions and depositions, must, at the request of any party in the suit, pass publication and deliver out the depositions to the clerk in court for the party demanding them, unless an order further enlarging publication shall have been in the mean time procured and served.

After examination of witnesses, publication may be stayed or enlarged * by motion in court, or petition to the Master of the Rolls; and where the cause is not set down, or where the party is not served with a *subpœna* to hear judgment, if he has any material witnesses to examine, he may, by motion or petition, apply for an order to enlarge * publication, a reasonable time, and (as in this case the adverse party can suffer no injury) the court will make an order as of course for that purpose; and it should seem that no notice to the adverse clerk in court of such application is necessary; but as the adverse party is intitled to set down his cause, upon giving a rule to pass publication, the court will make the order provisionally, as not to hinder him from setting down his cause in the mean time; and in some cases the court will enlarge publication though the cause is set down, and the party served to hear judgment; but this indulgence is generally granted upon a motion or petition, *alleging that publication passes by rule on such a day, or stands enlarged by order, of such a date, for a fortnight, or any other time; that the cause is set down, and stands thirty or forty days off, in his Lordship's or his Honour's paper of causes; that the party apply-*

* Note: It seems necessary, upon all applications to enlarge publication, to state on what day publication passes, and in what manner, whether by rule or order.

ing has still several material witnesses to examine; and praying that publication may be further enlarged for a week, fortnight, or any other reasonable time; the court will then judge upon the ground shewn for the application, and enlarge publication for the time prayed, or at least for a reasonable time; and the court will also frequently expect the party making this application to appear gratis to hear judgment, on six days notice to his clerk in court, and pray no day over, and will perhaps oblige him to take no advantage for want of parties at the hearing: and if he will not agree to these terms, his motion is often denied; because in that case a necessary presumption arises, that in making an application to the court to enlarge publication, he only intends delay, which the court always discourages.

Gilb. Chan.
144, 145.

In most cases the court will enlarge publication, and give a party an opportunity of examining witnesses, even though publication should have been enlarged by a precedent order, if any reasonable ground can be shewn; but this indulgence is never granted but upon notice of motion, of the party's intention to make this application, being previously served upon adverse clerk in court personally, or left with his agent at his seat in the Six Clerks office two days previous to the day whereon the application is to be made; and moreover upon an affidavit shewing satisfactory reason and cause to the court why the party could not examine his witnesses sooner; and an application of this nature is seldom or ever successful where it appears that the object of it is to put off the hearing of the cause.

Where

Where publication has actually passed, and the depositions have been copied and delivered out, if either party in this stage of the suit, moves to enlarge publication, it is necessary for him to shew by affidavit that he has (as he is advised) a material witness or witnesses to examine, without whose testimony he cannot safely proceed to an hearing; and also shew satisfactory reasons to the court why he or they could not attend and be examined before publication; and moreover in this case the party making this application, his clerk in court and solicitor, joining him therein, must make oath, "*That they have neither seen, heard, read, or been informed of, any of the contents of the depositions taken in that cause; nor will they see, hear, read, or be informed of the same till publication is duly passed in the cause;*" and upon such affidavit being made by the party, his clerk in court and solicitor as aforesaid, it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses, so as to hinder the other party from setting down his cause in the mean time.

Gilb. Chan.
145, 146.

Ibid.

Upon motion for leave to examine after publication, upon making the usual affidavit of not having seen the depositions, the Lord Keeper *North* declared, that in such a case, the other side should be at liberty to examine at large, as well as to cross examine the witnesses produced by the party who made the motion, (which was all he might do formerly;) and his reason was, that a crafty solicitor may lie in lurch and examine till after publication is past, and the other party may think himself secure; and so not examine to those points which he could otherwise have proved, in re-

gard he finds his adversary has not examined to those matters; and where once publication is passed, and the party that examined has seen his own depositions, there the side that lay still having tied up his adversary, so that he can only cross examine the other witnesses, applies for an order upon the usual affidavit to enlarge publication; and when he has got that order, then he comes in with a whole cloud of witnesses; and though it may be thought hard that any one should have liberty to examine after he has seen the depositions, yet, his Lordship thought it a reasonable penalty on such as would not examine in time, or that would be upon the catch to take advantage of the party; and he ordered the register to take

2 Vern. 253. it as a fixed rule for the future.

In the vacation, application to enlarge publication in any case, may be made by petition to the Master of the Rolls, which is left with his secretary at his office in the *Roll's Yard*, annexing thereto an affidavit in cases where the same is necessary: the petition answered, or the counsel's brief (in case the application is made in court by motion), being left at the register's office, and the order thereon drawn up, (which upon filing the affidavit in the affidavit office,) will be passed and delivered out; and being entered at the same office, a copy of such order must be served upon the adverse clerk in court *personally*, or left with his agent at his seat in the Six Clerks office, shewing, at the time of service, the original order passed and entered: and when the application is by motion, an affidavit of service of the notice in writing must be made and filed, in like manner as the affidavit upon which the motion is founded;

founded; and an office copy, as well of the last mentioned affidavit, as of the affidavit of service of the notice, must be taken from the affidavit office, for no other copy can be read in court.

Publication and hearing are not to be in the same term, unless there be special cause to the contrary; and where witnesses are examined only to inform the conscience of the court, the depositions are never published but by special order, or by consent of parties. Pract. Reg. 298.

Toth. 23.

All orders to enlarge publication should be obtained and served, as well upon the adverse clerk in court, as upon the examiner, on or before the day on which publication actually passes in the cause.

The particular circumstances under which a bill to perpetuate the testimony of witnesses may be exhibited in this court, have been already noticed at large; and with respect to depositions of witnesses taken *de bene esse*, the ordinary course of the court is, that these depositions are not to be published, unless a witness dies, or is gone to a great distance; so that it is impossible to have a subsequent examination of him in chief. This is the usual, but not the only case in which the court can order depositions taken *de bene esse* to be published: the fundamental rule is, that they are not to be published, but where there is a moral impossibility to have their examination in chief; as where the witnesses are dead, or beyond sea, at the time of applying, or before such time as there was an opportunity to examine in chief: and the common order the court makes is, that where publication passes in the cause, the depositions of such a witness

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de bene esse be published with this cautionary clause, "That it be without prejudice to any exception which may be made at the hearing of the cause, by any of the defendants against reading the depositions against such defendant."

2 Ves. 498,
499.

The order for examining *de bene esse* is only provisional, for if there is any opportunity of examining in chief, it must be done; and if any laches be in so doing, these provisional orders are forfeited, otherwise all these examinations would in effect be examinations in chief; and the court has refused to publish depositions *de bene esse*, in order to compare them with the depositions in the same cause, taken on an examination in chief; and the reason given by the court was, that if the depositions *de bene esse* were to be published, or any ways made use of against the witness so examined *de bene esse*, such witness ought to have a copy of the depositions before he is examined in chief; to the intent that he may have due cautionary means allowed him to prevent his contradicting himself; also many questions might arise, if it should happen that the depositions *de bene esse* were quite contradictory to the depositions in chief; and the court expressed an opinion, it could not be perjury at law*, there being no issue joined, as there must be before the depositions are taken in chief: and in the same case, the court rejected an application made for publication of depositions *de bene esse*, for the private inspection of the Lord Chan-

1 P. Will.
568.

2 Ves. 497.

* Cro. Car. 352. 3 Inst. 167.; and y^t it seems as if such depositions taken *de bene esse*, upon a bill to perpetuate the testimony of witnesses, where there is no issue joined, on the death of the witness, may be read in evidence; Carth. 165.

cellor, as it was supposed the examination *de bene esse* was more full than the examination in chief, though precedents of such a practice were produced.

To effectuate the publication of a deposition taken *de bene esse* of a witness dying before he could be examined in chief, a certificate of the burial of the witness, or an extract from the parish register-book of burials (if possible) should be procured from the parish where such witness was buried; or if that cannot be obtained, an affidavit should be made of his death. The certificate of the burial of the witness, or the extract from the parish-register, should be verified by affidavit of the person making the search, and the affidavit should likewise identify the witness, the entry of whose burial is thus registered, to be the same witness who was examined *de bene esse*, and whose deposition is required to be published. These requisites being obtained, an application may be made by motion in court, or petition to the Master of the Rolls, for an order to publish the deposition of *such a person*, a witness examined *de bene esse*.

The proper stage of a suit wherein this application should be made, seems to be after publication has passed in the cause; and it is then generally grounded upon an affidavit, stating in substance the matters before mentioned; and upon an allegation that publication has passed in the cause, and that the witness whose deposition is taken *de bene esse*, died before he could be examined in chief. Notice in writing to the adverse clerk in court is likewise necessary, if the application be by motion; and of the service of such motion an affidavit should

should be made and filed at the affidavit office, previous to the motion coming on to be argued; an office copy, as well of the affidavit on which the application is grounded, as also of the affidavit of service of the notice, should be procured from the affidavit office, to be read in court; and upon reading the affidavit of the death of the witness, and the affidavit of service, if the other side do not attend, the court will make an order as of course, that the deposition of the witness taken *de bene esse* in the cause be forthwith published.

When the application is by petition to the master of the Rolls, a similar affidavit of the certificate, or extract from the parish register-book of the burial of the witness, as before mentioned, must be annexed to the petition, which should state that publication has passed in the cause; and that such a person, a witness examined *de bene esse* on the part of the party applying, died before he could be examined in chief, as by affidavit appears, praying leave to publish the deposition so taken *de bene esse*, which upon filing the affidavit, will be ordered of course.

Gilb. Chan.
241.

If a witness be gone to a great distance into parts beyond sea, upon an affidavit thereof, and that the party hath not heard from him for a *certain length* of time, nor doth he know whether he is living or dead, or where he is; the court will, upon such facts being stated in an affidavit, make a similar order, as in the case of a witness examined *de bene esse*, dying before he could be examined in chief.

The counsel's brief, or the petition answered, being left at the register's office, the order made thereupon will be drawn up, the affidavit,

viz,

vit, when applied for by petition, being filed previous to the delivery of the order to be passed and entered. A copy of the order passed and entered, must be served upon the adverse clerk in court personally, or left with his agent at his seat in the Six Clerks office, shewing the original order passed and entered at the time of such service.

Hind's
Pract. 389.

The order to publish the depositions after service, upon the adverse clerk in court, must be left with the clerk in court in whose custody the depositions are lodged: if the depositions were taken by commission, or with the examiner, the order authorises the publication of the deposition, which will in consequence be opened, and copies delivered out to the parties applying for them. If any irregularity be discovered, or the adverse party be advised of any ground to object to the reading the depositions, he should give notice immediately to the adverse clerk in court, and move to discharge the order immediately upon the service of it, or with the earliest opportunity; and the court will decide, upon hearing the facts alledged on each side, verified by affidavits made and filed at the affidavit office; and should the order to publish be discharged, the depositions taken *de bene esse* will be of no avail: but although depositions taken *de bene esse* may be irregular, yet, at the hearing of the cause, it is too late to make objections for irregularity; for in such case, a motion should have been previously made to discharge the order for publication.

Ibid.

2 Atk. 190.

It has been laid down as a general rule, that where the defendant in a cross bill, who is plaintiff in the original, is in contempt for not putting

putting in an answer to the cross-bill, it is irregular to move to stay proceedings in the original cause till such answer comes in; but the plaintiff in the cross bill may have publication in the original enlarged to a fortnight after the answer to his bill comes in. The general rule of the court being, not to stay proceedings, but publication only.

1 Atk. 21.
291.

In all cases of a cross bill, after the original cause has been proceeded in, a motion to enlarge publication should be a special motion on notice, that the court may judge of it on circumstances, and not of course; as it is where the original cause is not proceeded in; for otherwise it would be easy to delay the hearing of a cause by keeping this up.

2 Vef. 336.

Depositions.

THE depositions of witnesses are their answers upon oath to such interrogatories as are exhibited and administered to them.

Pract. Reg.
137.

They are to be kept private, and no copy or abstract of them delivered till publication is past: the depositions taken by commissioners in the country, immediately upon the same being brought in, to be delivered to the proper fix clerk or his deputy, to be safely kept, and without opening, till publication be past: and those taken before the examiners are to be safely kept by them: and if the depositions of witnesses in a cause are not thus kept, as of record, by the proper officer, the same are void, and not to be made use of, either in this court or at law.

Ord. Chan.
156, 158.

Where

Where publication is passed, and the depositions are copied and delivered out, either party is at liberty, if he pleases, to examine to the credit and reputation of any of the witnesses; for the rule of evidence is the same in equity as at law; and if the party cannot be good evidence in a court of law, no more can he be in a court of equity: the party objecting must file *articles* (as the same are called) in the examiner's office, which contain the substance of the objections he makes to the reputation of the witness: the articles being filed, and a certificate of that fact being obtained from the examiner, the court upon application, by motion or petition, will give leave to the party to examine witnesses thereon to prove the truth of the articles exhibited by him, and substantiate the disrepute of the witness to whom he objects: the adverse party, who is to support the credit and reputation of his witness, is also at liberty to examine *toties quoties*; and the depositions taken upon this occasion must be published as in other cases: but objections of this nature are very seldom made, and generally speaking, they end in nothing but putting the party to an expence to no purpose.

Gillb. Chan.
147, 148.

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories exhibited by each; if the same are found to be leading, impertinent, or scandalous, this is the proper stage of the cause to have the interrogatories referred to a Master to certify whether the same be leading or not: this reference to a Master is obtained either by petition or motion of course.

Ibid.

The counsel's brief on the motion being left at the register office, and the order of reference drawn

The Practice of the

drawn up, passed and entered at the same office, a true copy of such order, passed and entered, must be served upon the adverse clerk in court personally, or left with his agent at his seat in the Six Clerk's office, shewing at the time of service the original order passed and entered. The original order, passed and entered, must be produced at the master's office, to whom the reference is made, and a true copy thereof left with him: the master's clerk will thereupon give out a warrant, which usually appoints an attendance, the day next but one from the day on which the warrant is taken out. A copy of the warrant must be served upon the adverse clerk in court; and after one or two warrants regularly served, both parties attend the master, and the interrogatories are argued, and frequently by counsel employed on each side; the master having taken some short time to consider of the interrogatories, then certifies his opinion of them to the court.

If the adverse party do not attend the warrant, after the regular service of three warrants successively, the master proceeds upon the reference, and then the report is made *ex parte*; but before this is done, the master requires the regular service of each warrant respectively upon the adverse clerk in court, to be ascertained upon oath. If the party against whom the master has reported, is dissatisfied with the report, and is advised that the same is not well founded, he is at liberty, in that case, if he pleases, to take exceptions to the master's certificate, and have the opinion of the court thereon; and *these* exceptions are proceeded upon in the ordinary mode of excepting to re-

ports: the party in whose favour the report is made must file the same at the report office; for until the report is filed no proceedings can regularly be grounded thereon.

If the Master reports the interrogatories to be leading, and this report is not excepted to, in that case all the depositions taken to those interrogatories must stand suppressed as of course, by motion or petition*; but if the report is excepted to, as on the one hand, the court never countenances leading or impertinent interrogatories; so, on the other hand, the court is not over curious in these matters, because it may fall out that the interrogatories may be reported leading in the very vitals of the examination, and on the very point on which the cause turns; and when this comes to be the case, the party who refers them hath gained his end, for perhaps he had a very bad cause, if the depositions had stood; whereas if they are suppressed, he has a very good one, (since his adversary must hear the cause without any proof at all,) unless the court is pleased to grant him another commission, on payment of his costs for his leading interrogatories, which is seldom or ever done after depositions are published; and it is very hard that in equity a man should be deprived of a plain right through the slip of another man's pen, or the inadvertency or unskilfulness of the counsel who penned his interrogatories; and therefore if it is possible for the court to help

* Notice in writing of such motion must be served in the usual manner upon the adverse clerk in court personally, or left with his agent at his seat in the Six Clerks office, the day next but one before the motion is made; an office copy of the Master's report is also essentially necessary to be in court when the motion is made, upon the reading whereof the court will make an order to suppress the depositions.

him they will, from the manifest inconvenience which must attend such a case; indeed if the interrogatories are reported to be leading in points upon which the jet of the cause does not turn, and if the depositions in those points should be suppressed, and the party has evidence enough left without them, there is no hurt done; but if the material points in the cause turn upon them, every effort should be made to support the depositions, since there might be the same answer to a fair question as to an unfair one.

Gillb. Chan.
148, 149.

If the commissioners misbehave themselves, or if the commission is executed contrary to notice, or no due notice given to the party, or if the depositions returned by commission are so badly engrossed, or so much interlined that they are not legible, in these, and many other cases of the like nature, there may be good reason to suppress the depositions; but in this last case the record or ingrossment of the depositions is always brought into court by the proper officers: the court takes the ingrossment into their hands, and if it is possible to be read, or if it is handed to the fix clerk and he can read it, the court will hardly suppress the depositions, or put the parties to new trouble, and to the expence of examining all the witnesses over again.

Ibid.

Where interrogatories, and the depositions of witnesses on them, had been suppressed, for that the interrogatories were leading, and then publication passed, the court was moved that a new set of interrogatories might be drawn and settled by a Master for the examination of *this* witness, whose evidence was very material, and yet must be wholly lost if the court would

not

not indulge them this way; and though the practice has been always against it, and it was insisted to be of dangerous consequence, yet one precedent being produced to this purpose, and the interrogatories which had been suppressed were such as might have been drawn by many other counsel, without any apprehension of their being leading: the court, to let in the party to the benefit of this witness's testimony, ordered interrogatories to be put in, and settled by a Master for his examination over again.

Proc. in
Chanc. 493;
1 Eq. Caf.
Abr. 232.
pl. 3.
Gillb. Rep.
150.

Upon a motion to discharge an order for referring depositions to the Master for *scandal and impertinence*, it was insisted that you cannot have such an order against a party in whose behalf the depositions were taken, where the interrogatories are rightly framed; but the proper application would have been against the commissioners for suffering a witness to insert in his depositions either scandal or impertinence; and in support of this, two cases determined by Sir *Joseph Jekyll* were cited.

Irish v.
Rooke,
August 1,
1728.

Lord Chancellor: I do remember the cases cited; but I own I had some doubt at the time: it seems to me very strange that depositions should not be referred for *scandal*; as to the *impertinence*, it is another question; but supposing interrogatories should lead to scandal, is it not very fitting that they should be referred in order to expunge the scandal? but if costs should be insisted on, it would be another consideration; because, as there is nothing of this kind arising out of *these* interrogatories, the party on whose behalf they are taken is in no fault; then the next question will be, whether the examiner or commissioners who suffer scandal or impertinence to be

Sherme v.
Voguel,
March 18,
1732.

inferred in depositions, ought to pay the costs? ^{2 Atk. 235.} Let it stand over to look into the cases cited, ^{236.} and likewise to search for orders made on motions of this sort. ^{Cocks and Worthington.}

But in a subsequent case, the *depositions* of a witness were referred for impertinence, and the Master reported them impertinent, and the witness took exceptions: Lord *Hardwicke* ordered it to stand over till the hearing of the cause, being doubtful whether a *deposition* could be referred for *impertinence only*; for in the case of *Cocks* and *Worthington* last above mentioned, and in the cases also therein cited, the reference was for *scandal* as well as *impertinence*. ^{3 Atk. 357. Pyncent v. Pyncent.}

Com. Att.
Pract. Reg.
137.

So where a witness examined for the defendant on one of the interrogatories, deposed several things reflecting upon —, as, that he was a vexatious man, and a stirrer up of, &c. for which the witness was ordered to pay costs, it was moved to discharge that order, upon the ground that it was more the commissioners fault who, upon the commission in the county, took their depositions, than the witness's, for the witness might be an ignorant person, and not know what was proper to depose, but the commissioner must be supposed to understand this; and the court was pleased to discharge the order, it being the fault of the commissioners to take down any deposition that was scandalous or impertinent.

Query, If the interrogatory had led to it? for it seems in the principal case it did not, it being the last general interrogatory.

2 P. Will.
406.

Com. Att.
Prac. R. g.
137.

Depositions are not to be suppressed upon a bare motion or petition only, without a reference to a Master, and a certificate upon it; except male-practice or some great irregularity plainly appears to the court; as where a plaintiff

plaintiff at common law having caused a witness to be examined in this court, where there was no suit depending; his deposition was ordered to be suppressed, and never to be given in evidence against the defendant, or any claiming by or under him.

Px. H. Ch.
157.
Pract. Reg.
138.

Where a witness's depositions on one side, contradict his depositions on the other side, it is the course to order him to attend the court, that he may explain himself, and set the matter right if he can.

Ibid.

No motion shall be made in court, or by petition, for suppressing depositions as having been irregularly taken, until the six clerk not in the cause have been first attended with the complaint of the party grieved, and shall certify the true state of the fact to the court, with their opinion, (if the solicitor or clerks shall not, for the case of their clients, agree before them,) for which purpose a rule for attending the six clerks shall be entered of course with the register, at the desire of the party complaining, which shall warrant their proceedings and certificate to the court.

Px. Alm.
22.
Ord. Chan.
134.

Where three witnesses examined by commission did, upon hearing of the matter in open court, depose, that the commissioners had set down their depositions otherwise than they did depose, the court ordered those depositions should be suppressed, and these witnesses examined again: and the Masters are not to pass any exemplifications of depositions, on a bare sight of the copies only, without first calling the officer or officers who have the custody of the records or originals of such copies, or some sworn clerk of his or their office, who is to produce the same before them, to warrant the signing thereof.

Cary's Rep.
37.

Ord. Chan.
144.

By former orders, either examiner may take out *subpenas* against such as he shall probably suspect to have delivered undue copies of depositions to the adverse party, his clerk, or solicitor, for the examination of such offenders on interrogatories, to be allowed of by a Master, and to be executed before the other examiners; as also against any he conceives to be able to prove the abuse, in case it be denied: and if, upon consideration of the answer to the articles, it be certified by the Master, that the parties are faulty, every person so offending shall be committed to the Fleet, till he has given the examiner satisfaction: but if the parties acquit themselves upon their examination, and the examiner is not able to prove the same, he shall pay such costs as the court shall think fit, for unjust vexation: and no copies of depositions are to be read or made use of in court, or before a Master, but what are taken out of the proper office, and assigned for the party for whom the same shall be read.

Ibid. 76 4.

Prac. Reg.
139.

The examiners or their deputies have liberty to attend in court, to inspect all books of depositions, which are read either for plaintiff or defendant, and to see whether they be duly signed for the party that doth produce the same: and in case the examiner shall discover any fraud or practice, the cause shall be put off: and the parties offending shall stand committed to the Fleet, till the officer injured be satisfied and paid his fees; and till 5*l.* be paid to such person as the Lord Chancellor shall appoint, for the use of the poor, and also till the client who is injured by the putting off his cause, be reimbursed his charges in respect thereof, and till the further order of the court.

Prac. Reg.
139.

It is said, that though a cause be dismissed upon hearing, yet may the parties have the depositions exemplified under the great seal for the further care and maintenance of their rights and titles at the common law.

Wes. Sect.
45.

On petition to amend a deposition of a witness, the witness was ordered to attend, as was also the examiner, the latter of whom being examined by the Lord Chancellor, swore he took the deposition truly from the mouth of the witness, to whom the deposition was afterwards distinctly read, and then the witness subscribed his name.

The witness being examined did not swear positively that the examiner had taken his deposition false, but that he was induced to believe he did not express himself in the manner the deposition was taken, and was positive he did not intend or mean to swear as the examiner had taken it, but that he really intended to swear in the manner as the amendment was desired, and that the same was what he had before declared in conversation, as also what another witness in the cause had positively sworn.

The counsel on the other side insisted, that though there were instances where a defendant's answer had been amended, yet no precedent could be produced for amending a deposition²⁵ after publication, or at least if the court was inclined to amend, this would be better deferred to the hearing, when the court would be more fully possessed of the whole matter.

1 Chan. Caf.

Lord Chancellor: Where it appears to the court that either the examiner is mistaken in taking the deposition, or the witness in making it, I think it for the advancement of truth and justice, that the mistake should be amend-

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2 P. Will.
647.
Griells v.
Gaufell.

ed; and the sooner this is done the better, in regard the witness may be dead, or in remote parts before the hearing; it would be hard and unjust to pin a witness down to what is a mistake, by denying to rectify it: as to what has been objected of the inconvenience of amending the deposition after publication, it was impossible to know it until publication; wherefore let the deposition be amended, as desired, and the witness swear it over again.

Ord. Chan.
102.

Where either the plaintiff or defendant obtains an order to use the depositions of witnesses taken in another cause, the adverse party may likewise use the same without motion, unless he be, upon special reason shewn to the court, by that party first desiring the same, prohibited by the same order so to do; but depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom they were taken, unless by special order: but if a legatee brings a bill against an executor and proves assets, another legatee, though no party, may have the benefit of those depositions.

2 Vern 609
Ibid. 472.

One examined as a witness *when disinterested*, he afterwards becomes intitled to the estate in question, his deposition shall be read: and after publication, you may examine as well to the *competency* as to the *credibility* of a witness; and a distinction between them has been exploded.

2 Vern. 464.

The depositions of witnesses taken by commission in a distant kingdom sometimes are omitted to be ingrossed upon parchment, or paper with the usual stamp: to remedy this inconvenience after publication has passed in the cause, the depositions must be taken by the clerk in court to the stamp-office, and a proper

per stamp impressed thereon, before an office copy be delivered out: And where depositions are taken in the language of the country in which the commission is executed, an application must be made by motion, or petition to the Master of the Rolls, that some notary public, or other person, (naming him) may be appointed to translate the depositions out of the language in which the same were taken into the *English language*; and that such interpreter be sworn to the true translation thereof: and also that the parties applying may be at liberty to read 'an office copy of such translation at the hearing of the cause, which is usually ordered as of course, upon an allegation that a commission for the examination of witnesses was executed at (*Hamburg*, or any foreign city,) and that the same has been returned, and the depositions published; and that the witnesses being foreigners, their depositions are taken in the *German*, *High Dutch*, or any foreign language: and upon these allegations the order is made of course: but a copy thereof must be served upon the adverse clerk in court personally, or left with his agent at his seat in the Six Clerks office, shewing at the time of service the original order passed and entered.

The answer being delivered to the person whom the order appoints to translate the same; after the translation is made, and ingrossed upon parchment with an half-crown stamp, the translator is taken with the translation to the public office, and the order appointing him being produced, the translation is sworn to before the sitting Master there, or in his absence before any other Master of the court: the translation and record of the depositions are to
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be annexed together, and left at the public office until the clerk fetches them away: an office copy of the translation is then made, and at the hearing of the cause, the order for reading the translation being produced, the office copy of the translation will be received in evidence.

Evidence in a cross cause, concerning the matters in issue in the original cause, not allowed to be read, after a decree in that cause, otherwise as to the depositions in the cross cause, not relating to the matters put in issue in the original; but where neither party examines witnesses in the original cause, the depositions of witnesses examined to the same matters put in issue by that cause, may be read at the hearing of the cross cause.

3 Atk. 501,
502.

The court will not make an order upon a Master to admit depositions taken in a former cause between the same parties to be read, as it is putting parties to an unnecessary expence; the proper course being to take exceptions.

3 Atk. 524.

Motion to suppress a deposition taken before commissioners, because the attorney for the plaintiff had wrote down the whole in the exact form of the deposition before it was taken. And though it had appeared that the witness had told him the facts and circumstances mentioned in it, yet his Lordship said, it would be of dangerous tendency to permit it to be read; for in depositions it is material to give the evidence as given by the witness; in this case the attorney had methodized and worded it, and it is therefore no more than an affidavit. He said, at law a witness is allowed to refresh his memory by notes as to dates and names, because there is nothing to guide the memory as to them; but he never knew a court of law admit the whole evidence to be given from writing. There

There is no certain rule how far evidence may be admitted from notes. Some judges had thought, and he was (he said) inclined the same way, that the witness might speak from notes, which were taken at the time of the transaction in question, but not if they were wrote afterwards.

Ambler's
Rep. 252.

Setting down the Cause for Hearing.

PUBLICATION being regularly passed, the cause is then arrived at the proper stage to be set down for hearing: and the plaintiff may of course have the cause set down for hearing before the Lord Chancellor, or Master of the Rolls, the term next ensuing after publication; and, by *special order*, the same term publication passes: and if the plaintiff omits setting down his cause the next term after publication is past, it may be set down at the request of the defendant the next subsequent term to that; but in injunction causes the defendant is at liberty to apply for setting down the cause the term *next after* publication has passed.

Ord. Chan.
212.

No motion is to be made to hasten a cause to an hearing, nor any cause entered with the register for hearing, without a certificate from the six clerks that the pleadings are filed: and no money or other reward shall be exacted or taken by any of the six clerks, or by any of the registers, for, or in their behalf, for the preferring and setting down any cause for hearing; and if any cause happens to be set down for hearing, wherein they shall not have been paid their fees, they may alledge the same in stay of the hearing of the cause.

Pract. Reg.
188.
Ord. Chanc.
232.

Ord. Chan.
136.

The six clerks claim a privilege of setting down a certain number of causes to be heard before

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before the Lord Chancellor, or Master of the Rolls: and they usually give notice to the sworn clerks, where they intend to set down causes for the ensuing term: the sworn clerks who have instructions from their clients to set down their causes for hearing thereupon, apply to their respective six clerks, shew them the depositions published, and leave with them a short note in writing, containing the title of the cause, and the object of the suit; and that a rule to pass publication has been regularly entered and expired; the six clerks will thereupon set down the cause before the Lord Chancellor, or Master of the Rolls, as the party setting down the cause directs: the six clerks are limited to the number of causes they have the privilege of setting down, and if this number be complete, the cause must be set down with the register, in which case a certificate must be previously obtained from the six clerks, *that the pleadings are regularly filed, or that publication hath regularly passed in the cause, as appears from his books*; the register will then set down the cause; *subpœnas* to hear judgment, which you annex to the *præcipe* for the *subpœna*, and on leaving the same at the *subpœna* office, have *subpœnas* made out.

The day on which a cause is set down to be heard, must be sooner or later, according to the priority of publication with respect to causes presented for hearing; and a note or paper of all causes, pleas, demurrers, exceptions to reports, &c. that are ordered to be set down for hearing, shall be set up and affixed by the registers in their office, two days before the same are respectively appointed to be heard; and in order thereto all clerks, solicitors and others, are to bring to the register's office in
due

due time, all orders for setting them down, otherwise the said causes, &c. shall respectively be put off from hearing for that term, and shall not come on again to hearing without further order.

Ord. Chan.
196.

The register's book of causes, &c. to be heard before the Lord Chancellor, or Master of the Rolls, is open to the inspection of solicitors at the register office during his hours.

Of the Subpœna to hear Judgment.

THE cause being set down and entered with the register, the next step to be taken to bring the cause before the court is to sue out this process; and for this purpose the party suing out the same is previously to procure from the register a note of the day his cause is set down; a *præcipe* for the *subpœna* is then made out, to which the register's note is annexed; and, being carried to the *subpœna* office, a *subpœna* to hear judgment is accordingly made; the note from the register being their warrant for making out the *subpœna*: this writ is always made returnable three days before the day on which the cause is set down to be heard, unless the return day happens on a *Sunday*, in which case a day more is allowed; and on the back of the writ must be set down the very day appointed for hearing: and the service of this process is similar to that of a *subpœna* to hear and answer.

Com. Sol.
33, 34.
Pract. Reg.
349.

A *subpœna* to hear judgment is either to be served personally, or else left with one of the house or family of the party; and if he resided above 20 miles from *London*, it must be served fourteen days before the day appointed to hear judgment,

Ord. Chan.

316.

Præct. Reg.

349.

Ibid.

judgment, exclusive of the day of service, except in the short vacation between *Easter* and *Trinity* terms, and then two days; but if the party reside within twenty miles of *London*, the *subpæna* must be served ten days before the time to hear judgment; except in the short vacation abovementioned, and then eight days.

If the plaintiff procures the cause to be set down for hearing, but does not serve the defendant with a *subpæna* to hear judgment; if the defendant attends, and the plaintiff does not proceed, or go on in hearing the cause, in that case the cause is struck out of the paper, and no costs is given on either side; but if the plaintiff serves the defendant with a *subpæna* to hear judgment, and the defendant makes and files an affidavit of such service, and the cause being in the paper, and the plaintiff's counsel does not open the bill; then, upon reading the defendant's affidavit of such service, the court will dismiss the plaintiff's bill with costs to be taxed.

But if the cause be set down at the defendant's request, and the complainant appeareth not, the defendant can take no advantage of it, unless the *subpæna* to hear judgment appears to have been served on the plaintiff; and otherwise the plaintiff is in no default: but if the plaintiff refuse to appear and open his bill, on reading an affidavit of service, the court will dismiss the bill with costs to be taxed.

Commonly, if the party, who hath a cause to set down for hearing, is not ready to hear it at the day, but desires it may stand over to a farther day, he must pay the other party the costs of the day, if the court thinks fit to indulge a farther day. Yet when a cause is set down at the defendant's request, if the plaintiff

(not

(not being served with process to hear judgment) and his counsel attend, and the defendant with his counsel do not, the plaintiff shall have no costs, as he was not compelled to appear without service of a *subpæna* to hear judgment, and the defendant might chuse whether he would go on to have the cause heard or not.

It is necessary to have an affidavit of service of the *subpæna* to hear judgment ready at the hearing, so that service may be proved if the defendants should not attend; but this affidavit is sometimes not filed till after hearing; for if the defendants attend it is useless: but if there be the least suspicion of the defendant's counsel not appearing at the hearing, the affidavit of serving the *subpæna* ought to be filed before the hearing; for the court may refuse to give judgment for want of the affidavit being filed.

The affidavit may be in this form:

“ Between A B, complainant,
C D, defendant.

“ In Chancery.

“ E F of, &c. maketh oath, That he this deponent did on the — day of — last past personally serve the said defendant with a *subpæna* issuing out of and under seal of this honourable court, by which said *subpæna* the said defendant was required to appear in this honourable court the — day of — now last past, to hear judgment the — day of — — — — —
aforesaid, at the suit of the complainant above named, by delivering the body of the said *subpæna* to the said defendant under seal as aforesaid.

“ E F.

Sworn,” &c.

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2 P. Will.
643.

Where an infant is defendant, the affidavit of service to hear judgment must be, that the guardian was served, not the infant, and this, (as it seems) though the infant be above fourteen, or want ever so little of twenty-one; and the serving the infant is not good, for *non constat*, but the infant might be in his cradle; or should it appear by the bill that he is near twenty-one, yet, being not able to defend himself, the service must be on the person appointed by the court to defend him.

A defendant absconding to avoid being served with the *subpœna* to hear judgment, sometimes occasions an application to the court to substitute a service upon the clerk in court; but if he be likewise out of the way, and nobody attends at his office, as the orders for service are discretionary, the court will, upon application, make an order that service upon the solicitor be good service, a copy of such order being at the same time left at the defendant's last place of abode with some of the family.

Hearing of the Cause.

THE pleadings being regularly filed, publication duly passed, and the cause set down for hearing, and process served to bring in the party to hear judgment, the suit comes in rotation to be heard before the Lord Chancellor or Master of the Rolls.

The register, on the evening previous to the hearing of the cause for the ensuing day, usually makes out a paper of causes which stand next for hearing; one copy whereof is fixed up

up in the Six Clerks office: There are generally twelve causes in each paper, and very rarely it happens that the paper is gone through in one day. The last cause, if it happens to be called on, is always privileged, that is, neither party can be obliged to pay costs of the day for not attending when called on, the same being never struck out of the paper for non-attendance. The register's book of causes, pleas, demurrers, exceptions, &c. is always open in office-hours at the register-office for the inspection of all persons to inform themselves, if a cause is set down to be heard, how far the same stands out of the paper, and when likely to come on to be heard.

The cause then being set down, and standing in the paper for hearing, the clerks in court and solicitors on both sides are to attend the court with the pleadings, in order that the same may be read as occasion requires; and the solicitors on each side must take care to have the pleadings and other records signed by the respective six clerks; this their clerks in court will procure, upon application for that purpose; for if they fail herein, and the six clerk in open court insists the office copies not signed ought not to be read, the cause will be struck out of the paper; for by the orders in Chancery, "No copies of bills, answers, or other record, shall be delivered out of the office, before it be signed by the proper six clerk to whom it belongs, with his proper handwriting, or by his deputy in his absence. Nor shall any copy not signed be made use of in court, or before any Master; which all clients are to take notice of, to the end they may be

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Ord. Chan.
104.

prepared with such copies at the hearing of the cause."

The method of hearing causes in court is generally thus: The parties on both sides appearing, one of the junior counsel for the plaintiff opens the bill, and another for the defendant opens the answer; after which the plaintiff's senior counsel states the case, and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff's counsel are read by one of the fix clerks if the cause is heard in *Westminster Hall*, or by the solicitor or his clerk if heard in *Lincoln's-Inn Hall*; and the plaintiff may also read such parts of the defendant's answer as he thinks material or convenient*. When the evidence or proofs in the cause are gone thro', the rest of the counsel for the plaintiff support by their arguments those of the leading counsel in the cause; the defendant's counsel then go through the same form of proceeding in defence of their client, except that they may not read any part of his answer: the counsel for the plaintiff are then heard in reply, and conclude the argument. The counsel on both sides being fully heard, the court pronounces the decree, the minutes of which are taken down, and frequently read openly in court by the register. And,

Either party may take a copy of the minutes of the decree from the register, if it is apprehended he hath made any mistake, or the court hath been led into error from wrong inform-

* Note, On a trial at law, if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it, he shews a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

ation and misapprehension; and in that case the decree, as the same appears in the minutes, may be rectified, on application by motion or petition for that purpose.

If the defendant or his counsel do not appear at the day of hearing, on affidavit being made that he was served with process to hear judgment, the cause is to go on, viz. the bill is opened, and the beginning of the defendant's answer read; and if the matter appears plainly for the plaintiff, the court will make such decree as the plaintiff's counsel prays: But a day in such case is always by the court given to the defendant to shew cause to the contrary against the decree so pronounced, commonly with these or the like words, viz.

"And this decree is to be binding to the defendant, unless he being served, with a subpœna to shew cause against the said decree shall at the return thereof shew unto this court good cause to the contrary; but before he is admitted to shew such cause, he is to pay unto the plaintiff his costs of this day's attendance; to be taxed by the Master." And the decretal order is to be drawn up accordingly; and before he is admitted to shew cause against it, he shall produce a certificate from the plaintiff's attorney in court, that the costs are paid, or an affidavit of the tender and refusal; after which he may petition that the cause may be set down again to be heard.

The decree *nisi causa* being drawn up, passed, and entered with the register, the plaintiff sues out a *subpœna* against the defendant to shew cause against the decree, and serves him therewith, as in other *subpœna*'s; but this writ being a judicial process, it must and always is

made returnable in term-time; if it should be made returnable out of term, or at any of the feals, as was once done, it would be set aside for being irregular: the words of the *subpæna* are to shew cause according to the order of the court, bearing date such a day and year, &c.

There is no prefixed time for the service of this *subpæna*, nor how many days notice the defendant is to have between the service and the day to shew cause; it were to be wished that it might be as in case of *subpæna*'s to hear judgment: though indeed where the decree is made at any of the days of causes within the feals after term, there the party has timely notice to shew cause; but when the decree is pronounced in term-time, the party, if the *subpæna* is made returnable the same term, as it may be, has but a very few days left to shew cause against the decree, and is sometimes straitened to do it.

If the defendant submits to the decree unless cause, then upon an affidavit of the service of the *subpæna* to shew cause, and upon a certificate from the register that no cause is shewn, the plaintiff's counsel move to make the decree absolute on the affidavit and certificate, which is a motion of course.

If upon the hearing the plaintiff doth not appear, the defendant upon making an affidavit of being served with a *subpæna* to hear judgment at the plaintiff's suit (except the cause was set down at his request), the plaintiff's bill shall be dismissed with costs.

If the party who procures a cause to be set down for hearing, is not ready to hear it at the day, but desires it may stand over to another

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other day, he must ordinarily pay the other party, who appears, his costs of the day, if the court sees fit to indulge him with a further day; and where a cause is ordered to be speeded, or heard in some short time, at the request of either party, he is commonly directed to do every thing *gratis* on his part, to bring his cause on to a speedy hearing.

Cross causes between the same parties are generally continued to be brought on to be heard together, at the request of either party, by motion or petition, of course, if the answer in the cross cause come in before publication passes in the original cause *, or in convenient time before the original cause is set down, or comes on to be heard. This chiefly depends upon the vigilance and attention of the plaintiff in the cross cause; for where the defendant in the cross cause is in contempt for not putting in an answer to the cross bill, the plaintiff in the cross cause (defendant in the original cause) should move to enlarge publication in the original cause until a fortnight after the answer comes in to the cross bill, which, upon special motion, will be in most cases granted: if this precaution be not observed, the original and cross causes cannot be brought on together (the course of the court being in such cases not to stay proceedings, but publication only). Pract. Reg. 182.
2 Vef. 336.
1 Atk. 21.
291.

So if the plaintiff in the cross cause, after publication past in the cross cause, as well as

* Note, The answer to a cross bill should always be got in before publication passes in the original cause, unless the plaintiff in the cross cause means to rest his defence upon the discovery arising out of the defendant's answer, and to go to hearing upon the depositions taken in the original cause, or to examine only to points not examined to in the original cause. 1 P. Alm. 9, 10.

in the original cause, or if both causes are set down for hearing, neglects to serve process to hear judgment; in all or either of these cases, the original and cross cause cannot be brought on to be heard at the same time, except the adverse party consents. Sometimes the cross bill is filed so late, that publication has passed in the original cause, and then it is usual to set down the cross cause upon bill and answer; and it becomes in some cases expedient for the plaintiff in the original cause, if the cross cause hath acquired priority in the paper of causes, or *vice versa*, when both causes are set down for hearing, and process served to hear judgment in each, to move for leave to bring forward his cause (if necessary) that both original and cross causes may come on to be heard at the same time, or that the cross cause or original cause (as the case may be) may stand adjourned, so that both causes may come on to be heard together. Upon an application of this sort, it may be necessary to add a request that the depositions taken in the original cause may be read at the hearing of the cross cause, *et sic e converso*. This is generally the case where both causes are set down, the one preceding the other, and some other causes intervene. A motion of this nature should precede the day whereon the cause first set down is appointed to be heard; otherwise it should seem, that if the court indulges the party in such an application made upon the day whereon the cause stands in the paper for hearing it, would be upon payment of costs of the day, *viz.* 5l.

If there be several suits here, which are merely cross causes between the same parties touching

touching the same matters, the depositions taken in one cause may (by order) upon the hearing be used in the other. Pr. Alm.
23.

It will be now necessary to consider the proofs admitted in evidence in this court upon the hearing of the cause; under which head will be considered, first, In what instances the depositions of witnesses may be read in evidence at the hearing;—secondly, In what they may not;—thirdly, In what cases parol evidence is admissible to explain, confirm, or contradict what appears upon the face of an agreement, deed or will, and in what cases not;—fourthly, The sufficiency and disability of a witness;—fifthly, What will be admitted generally as evidence, and what will not;—sixthly, The examination of witnesses to the credit of a witness already examined;—seventhly, The examination of a witness *viva voce* at the hearing.—And first,

In what Instances Depositions may be read.

THE copies of all depositions of good witnesses, regularly taken in the cause after answer, and duly kept, published, and signed, may ordinarily be read as evidence at the hearing; so if there be several suits, which are merely cross causes between the same parties, touching the same matters, the depositions taken in one cause may (by order) upon hearing be used in the other: so where there were cross causes, publication being passed in the first, but not in the second, an order was had that the depositions in either cause might be used in both; yet it was said that the depositions in the first could not be read in the second cause: if it appear to the court that there Pract. Reg.
152.

M m 4

has 1 Chan. Caf.
237.

Pract. Reg.
353.

has been a bill and answer, though they be gone off the file, yet the court will allow depositions taken in that cause to be used in another.

A motion was made that depositions in the cross cause might be read on the account directed on the original cause; for though the cross bill was dismissed, that does not vary the truth of the depositions, and the Master of the Rolls granted it, saving just exceptions.

b Vef. 579.

Salk. 286.

Upon offering the depositions of the plaintiff to be read, it was objected, that the plaintiff's own depositions could not be read; forasmuch as he was a party claiming under the will in controversy, and so could not be a witness for the will; and Sir *Joseph Jekyll* cited *Tilly's case*, where one was examined as a witness, who at that time was no ways concerned in point of interest, but afterwards became interested; and at a trial at bar in this case, the judges of *C. B.* sent a judge to the court of *B. R.* for their opinion in the point, who held, that the depositions could not be read; for that the witness himself was living, and he himself could not have been a witness at that time *viva voce*, because he was then interested.

But the Lord Chancellor, in the principal case, because the witness was a good witness, and disinterested at the time of the depositions taken, and this being in the nature of a bill of revivor to have the benefit of the proceedings in which the plaintiff was examined, admitted the plaintiff's own depositions to be read*.

So

* 1 P. Will. 289. 2 Atk. 615. Note, In courts of law, if a subscribing witness to a bond happens to be afterwards representative of the obligee,

So where a witness was examined before the hearing, while she was interested, but after the hearing she released her interest, and was again examined before the Master, and her depositions before the Master were allowed to be read.

2 Vern. 473.

A witness examined at a former trial of an issue between the same parties, and who had been examined in the cause, dies; not only his depositions may be read, but what he swore at the former trial may be given in evidence.

2 P. Will.
563.

Depositions in one cause may be used in a cross cause without motion; and where one party obtains an order, the other may use the same without motion.

So where either plaintiff or defendant obtains an order to use depositions in another cause, the adverse party may likewise use the same without motion, unless he be, on special reason shewed to the court, inhibited by the same order so to do.

Ord. Chan.
134.

In a case where co-defendants examine, the question is not, whether any *scintilla* of evidence is given, but whether material evidence, such as a court or a jury would lay weight on? So in this court the office of judge and jury is vested in this court on hearing the cause; and if the court thinks there is no material evidence against that defendant from the nature of the fact affecting him, or from the credit of the witness who has sworn it, his depositions will be read; otherwise the defendant would be cut off from having the benefit of this witness, merely from the ill practice of the

obligee, and is forced to bring an action, the plaintiff can never be examined there, it being impossible; but the rule is to suffer his hand to be proved in like manner as if he had been dead. 2 Vesey 42.

other

2 Vef. 223.
per Lord
Hardwicke;
decided in
the case of
Dixon v.
Parker.

other side: so where a co-defendant has examined witnesses, and so far has judged himself concerned in interest, that his evidence ought not to be read; yet if there appeared any collusion between the plaintiff and that co-defendant, that would not prejudice the party who would call him; or if there was any ground to suspect it, it should seem that notwithstanding the examination of witnesses by him, his depositions should be read in evidence.

The witness had been examined before appearance; the defendant appeared and answered. The witness survived eighteen months. The depositions had been published pursuant to an order, defendant consenting; a motion had been made, before the Master of the Rolls, to suppress the depositions, but refused on account of defendant's consent, upon which the plaintiff now insisted it should be read: Lord Chancellor seemed of opinion it ought not.

1 Brown, 84.
Depositions taken in the court of Admiralty
Toth, 192. have been read in this court at the hearing.

Depositions in an ancient cause between other parties, are sometimes allowed to be read, even against one that claims not under any of the parties: but depositions in a cause between other parties, though touching the same matters, are not to be read, unless by special order.

1 Chan. Caf.
73.

Px. H. Ch.
18.

The examinations of witnesses after appearance, and before answer, are only *de bene esse*; yet if any of them die before the defendant has answered, their depositions shall ordinarily be made use of either here or at law, else not.

Px. Alm.
24.

In what Instances Depositions may not be read.

WHERE a bill cannot be read at law; the depositions in the cause cannot be read, either there or in this court; wherefore if a bill be dismissed for irregularity, as, that the party comes by revivor, when he should come by original bill, so that in truth there never was regularly any such cause in court, and consequently no process, the depositions in the cause cannot be used; for the bill could not be exemplified, nor used at law: but if a cause be dismissed, because the matter is not proper to be decreed; yet the testimony of a fact proved in such cause, may be used as evidence to that fact, between the same parties, whenever it shall come in question again.

1 Cha. Caf.
175.

If it appears a witness has deposed falsely in part, as where his depositions contain manifest contrarieties in any material point, his depositions are wholly to be rejected; so depositions in a cause to perpetuate the testimony of witnesses, shall not be made use of, or given in evidence against any, other than the defendants who were subpœna'd to defend it, or some claiming by or under him or them on interest which accrued after the bill preferred: so also the proofs made before answer upon a *certiorari* bill, are not to be made use of at the hearing; for they are only to give the court jurisdiction, and the defendant could not then examine any thing on his part.

Pr. H. Ch.
18.
Cl. Tut. 16.

Px. Alm. 4.
Toth. 189,
190, 191,
192.

Pr. H. Ch.
8.

Note, If a witness refuse to be cross-examined, it is a good cause of exception to his depositions.

Cl. Tut. 9.

Depositions

Pr. H. Ch.
18.

Depositions in a cause between other parties, though touching the same matters, are not to be read, unless by special order; neither are depositions in other courts without such order, nor then, if any of those depositions that were taken after publication passed herein; so, though a *subpœna* to rejoin be sued out, yet if the same be not served, no proofs are to be made use of at the hearing, but the cause must be heard upon bill and answer.

Pract. Reg.
156.

The depositions of new witnesses upon a bill of revivor, after publication, may be read in this court; but an issue having been directed, and the witnesses aged and infirm, the court may, according to the prayer of the bill of revivor, give leave that they be examined, and that their depositions may be used at the trial, in case the witnesses die: so proofs or evidences of matters not in issue, which go to the very right of the thing, may be offered at the hearing; and though the court will not decree upon a matter not in issue, which the other has not an opportunity of examining to, yet it will not decree against what it sees to be the mere right, but will sometimes order that matter to be tried by an issue at law, and decree thereupon.

1 Chan. Caf.
30.

2 Chan. Caf.
3. 196.

It was moved to suppress depositions, because they had been taken before the Master upon the same matter upon which the witness had been examined in chief, without a special order for the re-examination.

Lord Chancellor: A witness is not to be re-examined before a Master, upon the same interrogatory upon which he has been examined in chief; yet, I should have thought upon a substantially different interrogatory he might;

might; but I find it cannot be done without leave; this was laid down in *Browning v. Barker* in 1774 by the Lord Chancellor and Master of the Rolls: if the interrogatory mislead the witness out of the matter in issue, the interrogatory must be suppressed, and the deposition falls with it; as to other matters you may except before the Master: but it appears, the examination, if to the same matter, must be by order, otherwise it is practising upon the witness: motion was granted.

Sawyer &
Bwyer.
1 Brown's
Chanc. Rep.
388.
Pract. Reg.
165.

Depositions of one defendant are not to be read for another, where the former is concerned in interest, and a decree may be had against him; so on an objection to competency, they are never read; but if to credit only, they may be read, and left to the consideration of the court.

Ibid.

Depositions taken in a cause wherein father is tenant for life, cannot be read against the son, tenant of the remainder in tail; so depositions in another cause, in which the matters in question were not in issue, shall not be read; so likewise depositions taken in a suit between other persons, are not to be given in evidence, for there is no opportunity to cross-examine: depositions likewise taken in a cause where the plaintiff's father was a party to the suit, being in all matters the same, his father being only tenant for life, those depositions could not be read against him; for the advantage ought in all cases to be reciprocal: and where a cause is dismissed, the matter of it not being proper for equity to decree, yet the fact in this case being proved, may be used as evidence between the same parties, whenever it shall come in question again: but when a cause is dismissed,

dismissed, not upon this ground, but for irregularity, so that in truth there was never regularly any such cause in court, and consequently no proof, those proofs cannot be used: for proofs cannot be exemplified without bill and answer, nor can they be read at law, unless the bill upon which they were taken can be read: no depositions ought to be allowed which were not taken in a court of record; and they are like examinations of witnesses; so that although the defendant may read what he will, yet the other side may read the whole afterwards.

Note, Exhibits proved by depositions must be shewn at the hearing, if the party would have any benefit by them.

Depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom they were taken (unless by special order); but if a legatee brings a bill against an executor, and proves assets, another legatee, though no party,

²Vern. 413. may have the benefit of those depositions.

Where a witness's depositions on the one side, contradict his depositions on the other, it is the course to order him to attend the court to explain himself, otherwise his depositions shall be suppressed.

Char. Caf.
298.

Note, Copies of depositions are not to be recorded or exemplified.

²Cha. Rep.
36.

In what Cases Parol Evidence is admissible to explain, confirm, or contradict, what appears on the Face of an Agreement, Deed or Will; and in what Cases not.

IT seems to have been agreed as a general rule, even before the statute of frauds and perjuries, that no parol evidence could be admitted to control what appeared on the face of an agreement, deed, or will, not only from the danger of perjury, but from a presumption that whatever the parties had at that time in contemplation was all reduced into writing.

5 Co. 68.
a. b. 8 Co.
155. a.
Kelw. 49.

But this rule has received a relaxation, especially in courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and to inform the conscience of the court; *viz.* that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second, it could do no harm, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence.

2 Vern. 98.
337. 625.

But with respect to records, it seems a general rule, that nothing can be admitted, tho' sworn by witnesses of the best credit, to contradict them; for being things of the greatest credit, they can only be questioned by matters of equal notoriety with themselves.

1 Vern. 369.

A B, being seized in fee of a real estate as heir on the part of his mother's mother, and being also seized in fee of a very small estate as heir to his own father, devises all these lands to trustees and their heirs, in trust to pay several annuities

annuities and charities; after payment of which, he devises the residue of the rents and profits of the premises to his own right heirs of his mother's side for ever; and the question was, who should be entitled to the residue of the rents and profits, whether the heir of the mother's father, or the heir of the mother's mother?

1st. It was insisted, that parol proof should be read as explanatory of the testator's intention.

To which it was answered, that the parol proof might be in some cases allowed as to personal estate, as was done in the case of *Fave* v. *Fave*; yet in the case of land, where the statute requires the will should be in writing, there ought not to be any parol proof: and therefore in the case of *Strode* v. *Lady Ruffel* and others, where the devise was of lands out of settlement, the House of Peers would not allow any parol proof; further, the title of the devisee must depend upon the words of the will, otherwise no counsel that should see the will, would be able to give a decree thereupon.

2 Vern. 621.
Reports in
Chan. part
3. fol. 90.
folio edition.

But the Lord Chancellor said, that the reason of this was, because the settlement should be produced; without the producing of which, the lands were to be presumed free from any settlement; and though *Fave's* case was only of a personal estate, yet the same being above the value of what one might by parol dispose of (for it was a great personal estate), it seemed within the reason of a devise of land.

However, that in this case, parol evidence of what the testator said, or directed, when he ordered the will to be made, might be admitted; as where one having two sons, both named *John*, devised land to his son *John*, there parol

5 Co. 68.

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proof was admitted to shew which son *John* the testator meant, and yet *additio probat minoritatem*; so if there were two persons both named *I. S. of Dale*, and I should devise my land to *I. S. of Dale*, parol evidence would be admitted in such case, to prove which *J. S. of Dale* was intended by me; and for the same reason in the principal case, there being two heirs of the mother's side, *viz.* one who was heir of the mother's father, and the other heir of the mother's mother, the court might well admit parol evidence to shew which heir of the mother's side was intended.

Upon which two witnesses were read, proving, that at the time of making the will, the testator declared the heir of his mother's mother should have his estate, because it came from thence.

So where one makes a will and an executor, and gives a legacy of 500*l.* to the executor, but makes no disposition of the surplus, parol evidence of the intention and declaration of the testator touching the surplus is admissible*; and the

* *Ibid.* 210. Note, The result of the many cases, whether an undisposed surplus ought to go to the executors or next of kin, appears to be this: By law the appointment of an executor vests in him all the personal estate of the testator not otherwise disposed of; but wherever courts of equity have seen on the face of the will sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees, for those on whom the law would cast the surplus, in case of a complete intestacy, i. e. the next of kin; as where the executors are called executors *in trust*, or where any other expressions occur, shewing the office only to be intended them and not the beneficial interest. *Pring v. Pring*, 2 Vern. 99. *Rachfield v. Careless*, 2 P. Will. 158. *Graydon v. Hicks*, 2 Atk. 18. 2 Vef. 91. *Lord North v. Pardon*, 2 Vef. 415. So a pecuniary legacy to a sole executor affords a sufficient argument to exclude him from the residue, as it is absurd to suppose a testator to give expressly a part of the fund to the person intended to take the whole. *Cook v. Walker*, (cited) 2 Vern. 676. *Joslin v. Brewett*, Banb. 112. *Davies v. Davies*, 3 P. Will. 40. And it is settled, (notwithstanding in the case of *Ball v. Smith*, 2 Vern. 675.) that the wife being the executrix shall make no difference, as appears as well by the cases mentioned in *Farrington v. Knightly*, 1. P. Will. 545. as by *Martin v. Rebow*. Bro. Chanc. Rep. 154. So equal pecuniary legacies to two or more executors

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the ground of its admissibility is, that it is adduced to rebut a presumption raised against the legal title of the executor*; so also parol evidence, when concurring with a conveyance, and only to rebut a pretended resulting trust, was admitted to shew the intention of the party†.

shall exclude them from the surplus. *Peter v. Smith*, 1 P. Will. 7. and the several cases there mentioned. Neither will legacies to the next of kin vary the rule. *Andrew v. Clark*, 2 Vef. 162. But wherever the legacy is consistent with the intent that the executor should take the whole, a court of equity will not disturb his legal right; and therefore when the gift to the executor is only an exception out of another legacy, it shall not exclude him from the residue, because it is necessary to make such exception expressly. *Griffith v. Rogers*, Prec. Chan. 231. *Hoskins v. Hoskins*, Prec. Chan. 263. *Lady Granville v. Dukes of Beaufort*, 1 P. Will. 114. *Jones v. Westcomb*, Pre. Chan. 316. *Newslead v. Johnson*, 2 Atk. 45. So in *Lawson v. Lawson*, 7 Bro. Parl. Caf. 511. the same principle seems to have prevailed. So a legacy to one only of two or more executors shall exclude neither from the surplus, because the testator might intend to such one a preference *pro tanto*. *Colesworth v. Brangwin*, Pre. Chan. 323. *Mason v. Hawkins*, 4 Bro. Parl. Caf. 1. *Johnson v. Twist*, (cited) 2 Vef. 167. *Bishop of Cloyne v. Young*, 2 Vef. 91. *Wilson v. Ivatt*, 2 Vef. 166. The same rule and reason holds, where several executors have unequal pecuniary legacies. *Brasbridge v. Woodroffe*, 2 Atk. 69. *Bowker v. Hunter*, Bro. Chan. Rep. 328. although in the last case *Darwell v. Bennet*, 2 Vern. 677. *Bailey v. Mead*, Prec. Chan. 92. and 2 Vern. 361. and *Vachell v. Jefferies*, Prec. in Chan. 169. and 1 Bro. Parl. Caf. 167. were objected as authorities against the determination. Then as to specific legacies, it is determined that a specific legacy will exclude a sole executor. *Randall v. Bockey*, 2 Vern. 425. *Souchot v. Watson*, 3 Atk. 226. and also that distinct specific legacies of unequal value to several executors shall not exclude them. *Blinkhorne v. Feast*, 2 Vef. 27. and the language of Lord Hardwicke in *Southcot v. Watson*, treats specific and pecuniary legacies as standing precisely upon the same ground in questions of this nature,—however no case occurs in the books in which distinct specific legacies of equal value to several executors, have excluded them from the surplus; and the argument which supports this rule as to pecuniary, certainly does not apply with equal force to specific legatees, since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, &c. &c. amongst his executors in some particular manner, although equally in point of value, and was instantly with an intention that they should take the surplus. *Shrimpton v. Stanhope*, (cited 3 Atk. 230.) is not a case of distinct specific legacies, for it appears from Reg. Lib. B. 1736. fol. 104. that the testator there gave some specific legacies to a man and his wife jointly, whom he also made his executors. And so, in *Willis v. Brady*, Barnard 64. and the cases therefore seem like legacies to a sole executor. 2 P. Will. 210. Cox's editions, in notes.

* *Lady Granville v. Dukes of Beaufort*, *ibid.* 114. *Littleburgh v. Buckley*, 2 Vern. 677. *Batchelor v. Searle*, 2 Vern. 736. *Rachfield v. Careless*, 2 P. Will. 158. *Lake v. Lake*, 1 Wilson, 313. *Brasbridge v. Woodroffe*, 2 Atk. 68. *Ulrick v. Litchfield*, 2 Atk. 373. *Blinkhorne v. Feast*, 2 Vef. 28. † 1 P. Will. 113.

The general rule is, the best evidence should be given that the nature of the thing will admit; and therefore as to all deeds, writings, and letters, they must be proved, unless under certain circumstances; as when they are shewn to be in the adverse party's hand, for then you will be permitted to prove the contents; if shewn to be destroyed, you may then read reasonable proof of the destruction, and parol evidence of the contents.

Per Lord
Hardwick,
dec. in Cole
v. Gibbon,
1 Vef. 505.

So on a bill to supply the loss of a deed charged to be in defendant's hands, though a strong case, (as urged for the plaintiff) for making an immediate decree, yet if the defendant insist on it, a trial must be directed; there being the same rule of evidence at law on loss of a deed as in this court; nor is it necessary to order that the depositions of witnesses should be read at law, for courts of law always read them.

2 Vef. 232.

This court has been in many instances more liberal in admitting parol evidence in the case of articles, than it would have been in the case of deeds—for articles are merely the heads of the parties meaning, and therefore in the case of articles, meaning must be resorted to at all events. Even in conveyances the court will receive parol evidence, where the words will admit of two meanings, or where the extent is doubtful; but in articles, which are executory, the court has nothing to resort to, but the meaning; and the only case in which the court can refuse to hear parol evidence as to articles is, where it goes to contradict flatly the whole substance of them: and parol evidence of the attorney has been admitted to prove a party to a settlement had notice of a prior incum-

brance: for it is impossible to refuse, as incompetent, parol evidence, which goes to prove, that the heads taken down in writing were contrary to the concurrent intention of all parties; it is the only way of explaining latent ambiguities. So if there be two manors of *Dale*, you must make out that fact by parol evidence; and if you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity: so parol evidence of the actual situation of the subject spoken of, is introduced into this court to make the deed intelligible; but if the words themselves are intelligible, there is no instance where parol evidence has been admitted to explain them into a more vulgar sense, and clearly into an ungrammatical one.

1 Bro. Cha.
Rep. 341.
dec. Count-
ess of Shel-
burne v.
Earl of In-
chiquin.

Parol evidence was admitted to shew that though a bond on a marriage was for 150l. yet the agreement was for 100l. but in this case the bill was dismissed, as being a private agreement to deceive a material party: the court, notwithstanding the statute of frauds, sometimes goes into parol evidence, as where the statute would otherwise be the occasion of fraud; which was the case of *Walker v. Walker*, Dec. 2, 1744; where on a bill for performance of an agreement for the surrender of a copyhold, it was insisted, that the agreement was also, that the other should reciprocally surrender *his* copyhold for the benefit of the defendant's son; and parol evidence was admitted, as it was setting up an agreement to be performed on the other part as a consideration of the former agreement not to contradict it.

2 Ves. 375.
Pitcairn v.
Ogbourne.

But parol evidence is never admitted to contradict a written agreement, and to support a fal-
lacious

lacious private one, entered into for the purpose of fraud; and there is no instance where a written agreement on a marriage notoriously between the parties, that this court even admitted evidence to prove a private clandestine treaty, that the agreement should not avail, what on the face it imported to be: however ^{2 Ves. 375.} there may be cases wherein courts of law and equity (and the rule is the same in both) will let in circumstantial evidence to prevent that fraud from taking place, which would arise from insisting, that something was got into writing, which would deprive the party of the benefit of detecting that fraud: as on a bill for specific performance of an agreement, the defendant may insist it has since been discharged, by parol between the parties; and that defence will be received.

Ibid.

So in the case of the *South-Sea Company v. D'Oloff*, where by agreement the company were not bound to answer for any irregularity by supercargoes, unless information was given in two months after return home; the instrument was not drawn up until on board the ship, and in a great hurry, and executed there by the party; who, when he got out to sea, and read it over, found it was six months instead of two; and he brought a bill to be relieved against that variation in the instrument: Lord *King* sent it to an issue; and it was had on a question, whether it was the original agreement, it should be two, instead of six months: verdict was in favour of the plaintiff, that the agreement was designed to be two months, and a decree in consequence of that, to relieve the plaintiff against any difficulty by that variation:—this was in fact setting up parol evidence to contra-

2 Vef. 375.
Per Sir
John
Strange,
Master of
the Rolls.

dict the very words of the written agreement; but it was considered, that the variation would be a fraud, and therefore the court, which was to relieve against fraud, must admit it.

On a bill brought by the next of kin to the deceased, against the executors, for a distribution; the executors in their answer set forth a clause of the will, whereby the testator gave the *residuum* of his estate to the poor of the parish of K in county L. It afterwards appeared that this parish of K was not in the county of L, but in the county of N; and that the testator really thought that this *residuum* would not amount to above 10l. and that he declared so at the time of making his will; whereas it amounted to near 1000l.

His Honour's opinion was, that parol evidence ought to be admitted to help out the description of the parish, and that this was a settled rule in equity: and that therefore the parish of K in county N, were well entitled under the will; but that such evidence ought not to be admitted in relation to the *quantity of the thing* devised.

Barnard's
Rep. 118.

So also where there was an agreement in writing for taking a house at 32l. *per annum*, and part of the agreement was, that the owner should put the house in repair; it was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and therefore without alteration of the written agreement at all, the house was pulled down by consent of the tenant, who was apprized of the great expence it would be to the landlord: and therefore an agreement was by parol only on his part to add 8l. *per annum* to the 32l. which he was only to give in case it was repaired:
the

the tenant brought a bill for specific performance, to have his lease on the foot of the written agreement to pay only the 32l. rent: the defendant by his answer set up the parol agreement.

Master of the Rolls: Such evidence is frequently suffered to be read, especially to rebut such an equity as now insisted on by the bill; as where the agreement is in part carried into execution, parol evidence is allowed to prove that; or where it is a hard agreement: and the single question being here, whether the court should decree a specific performance of the agreement, which the plaintiff insists upon, and being satisfied from the parol evidence that it should not, the court must dismiss the bill.

1 Vern.
240.

Note, For the plaintiff it was then insisted, the court should not dismiss the bill, but on the general relief prayed, should make a decree now according to the agreement defendant set up, though no cross bill was brought for that purpose, which had been done often upon defendant's own submission: but against this it was said, (to which the court agreed) that the court never made such a decree on the general relief, where it was inconsistent with the particular relief prayed; though it has been done where not inconsistent; and the bill was dismissed with costs.

2 Vef. 299.
Legat v.
Miller.
Eden v.
Lord Bute,
7 Bro. Parl.
Cas. 204.
441.
1 Vern. 240.
Cas. Temp.
Talbot, 240.

If A purchases in the name of B, A may be admitted to prove that he paid the purchase-money, and so make it a resulting trust, or trust by implication of law for himself.

1 Vern. 366.

So in the case of an entry in the book of a steward of a manor, parol evidence by the foreman of the jury was admitted as good evidence to shew that a feme covert surrendered her

whole estate, although the surrender upon the roll, and the admission thereon, was but of a moiety.

²Vern. 547.
252.

Parol evidence has been allowed to shew a man's intention in a will, where the question was, if a legacy should be a satisfaction of a debt due from testator to the legatee.

²Vern. 593.
506. 648.
736. 593.

Also parol evidence of the person who drew the will, was admitted to shew what the testator intended to pass by a devise of his household goods.

²Vern. 517.
Reg. Cal.
Abr. 415.

I W being solicited by T W and his sister to do something for them, said, if you will surrender your copyhold for the benefit of R W, I will secure annuities to each of you for lives; whereupon T W promised to surrender his copyhold accordingly; and I W did actually surrender his, charged with annuities of 5l. *per annum* for T W's life, and 2l. 10s. for the sister. R W the defendant to the bill brought by T W for the annuities, refused to pay them, unless T W will surrender his own copyhold estate, pursuant to his promise, and insisted, though there was no written agreement between I W and T W, parol evidence may be admitted to prove the fact: the court was of opinion, R W may be allowed to read parol evidence to rebut the equity set up by T W's bill; for the defence set up by R W arises from the imposition of the plaintiff I W, and therefore is not at all affected by the statute of frauds and perjuries.

²Atk. 99.

There are instances where this court has admitted parol evidence to ascertain the person intended by the testator, where he has been mentioned only by a *nick-name*; or where there have been two persons, who have had the same

Christian

Christian and surname; but there is hardly an instance to be found where the court has gone so far, as to allow parol evidence of the intention of a testator, where there is only a *blank*, and such evidence has been refused to be read. ² Atk. 240.

B by his will gives all his real and personal estate equally among his children; and at the conclusion of it directs his executor to lay out a sum not exceeding 300l. in putting out the defendant his son, apprentice: B in his lifetime lays out 200l. in putting out the defendant, clerk to a person in the navy-office, and dies without revoking his will; evidence was allowed to be read of the testator's declarations, that this advancement should be an ademption of the legacy. ³ Atk. 77.

But notwithstanding these cases, the courts have been very unwilling to admit parol evidence in relation to any thing that appears on the face of a will; and it is certain that too much caution cannot be used in this particular, especially when it is considered that the statute of frauds and perjuries (which was made to prevent perjury, contrariety of evidence and uncertainty) binds the courts of equity as well as courts of law; as also that little regard ought in many cases to be had to the expressions of the testator, either before or after the making his will, because possibly these expressions might be made by him on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements, which cannot after his death be found out.

It has been held, that oath of having seen such a deed, is not to be allowed as proof thereof, for it may have been forged; but the oath

Cary's Rep.

43.

oath should be, that he saw it sealed and delivered.

A presbyterian who had three infant daughters bred up that way, and had three brothers presbyterians, makes his will, appointing his brother, and also a clergyman of the church of *England*, guardians to his three infant daughters, and dies, having sent his eldest daughter to his next brother: the clergyman gets the two other daughters into his custody, and places them at a boarding-school, where they were bred according to the church of *England*, and brought his bill to have the eldest daughter placed out with the other daughters:

The three brothers that were presbyterians brought their bill to have the two daughters delivered to them, offering *parol* evidence, that the testator directed and declared he would have his children bred up presbyterians; but the court declared that no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land.

3 P. Will.
51.

But in a subsequent case, on a difference of opinions between the guardians of Lord St. *John*, Lord *Hardwicke* said, that as to the particular method of education, the court will receive *parol* proof of the intent of the father, receiving all sorts of evidence to govern their direction.

2 Ves. 57.

Irham v.
Child, 1
Bro. Chanc.
Rep. 92.
Vid. also
Lord Port-
more v.
Norris, 2
Bro. 219.

Upon a grant of an annuity, a bill was filed to redeem, upon a suggestion that it was part of the original agreement, but omitted in the deed, from an apprehension that it would make the transaction usurious; and *parol* evidence was offered to prove it was part of the original agreement, but refused to be admitted; the bill not stating the omission to have been by fraud.
Where

Where a will explains itself, no evidence *debors* shall be admitted: so collateral proof shall not be admitted against the express words of a will, but the intent of a trust may be supplied by proof.

Per Cur. 2
Mod. Caf.
in Law and
Equity, 9.

2 Freem. 52,
53.

A devised particular land to his executors to be sold for payment of all his proper debts, and gave directions to the person who drew the will, to give all his personal estate to his executors; but by mistake that was omitted, tho' proved by the person who drew the will.

Harcourt, Chancellor, decreed the executors to account for the personal estate, saying, he must construe the intention of the testator out of the words of the will, and not upon parol evidence: as to the parol evidence of the intent of the testator, *debors* the will, was cited *Littlebury v. Buckley*: and,

8 Vern. Abr.
195. pl. 25.
Gale v.
Croft, 12.
ann. M. S.
Rep.
In Dom.
Proc.

Per Lord Chancellor: Parol evidence in that case was admitted, because the parol evidence there was an affirmance of the rights at common law, in opposition to a presumption in equity, that when the executor had a specific legacy, the surplus was not intended to be given to him; but in this case the parol evidence is to control the common law, and give the personal estate to the executor, which is affests at common law to pay debts.

A possessed of a considerable personal estate, by will bequeathed several legacies, but gave none to his executor, and held clearly, that no parol evidence would be admitted to prove that the testator did not intend that the executor should have the residue of his personal estate, for that this would not be to admit evidence to own an implication, but to contradict the rule of law, and what appeared on the face of the will.

Lady Os-
bourne v.
Villiers.
Hil. 6 Geo.
2. 2 Equity
Cases Abr.
416.

Of the Sufficiency and Disability of a Witness.

THE rules as to evidence are the same in equity, as at law; and if A was not admitted as a witness at a trial there, because materially concerned in interest, the same objection will hold against reading his depositions here.

Manning v.
Lechmere.
1 Atk. 453.

All witnesses that have the use of their reason, are to be received and examined, except such as are infamous, or interested in the event of the cause; all others are competent witnesses, though a jury.

Vid. for this,
3 Blackstone
370.

Infamous persons are such as may be objected to *proper delictum*, as an attainder, judgment or conviction of treason, felony, piracy, præmunire, petty larceny, perjury, and also a judgment in attain for giving a false verdict, or in conspiracy, at the suit of the king: these are good causes of exception to a witness while they continue in force. So if a man has had an infamous judgment, and has stood in the pillory for an offence, which is contrary to the faith, credit and trust of mankind, as forgery was formerly, he cannot be a witness in any cause; for it has been recently determined upon solemn argument, that it is the crime that creates the infamy, and takes away a man's testimony, and not the punishment for it.

2 Will. 18.

Interested witnesses may be examined upon a *voir dire*, at a general examination of witnesses, if suspected to be secretly concerned in the event of the cause; or their interest may be proved after the publication, by examination, which last is the only method of supporting an objection

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tion to a witness upon the score of *infamy*, for no man is to be examined to prove *his own infamy*. 4 Inst. 279.

The plaintiff's counsel objected to the evidence of Sir *John Chesbire*, as his wife is charged with fraud and mal-practices, and as his testimony might be supposed to go in favour of his Lady, by palliating and excusing her conduct in relation to the procuring her husband to be made a trustee of the whole legal estate, under the late Mr. *Cotton*'s settlement; and besides, if the court should be of opinion she has been guilty of a fraud, she will be liable to costs, and his evidence will be favourable to her with respect to costs, and will be in some measure against the rule, "that a husband shall not be examined for or against his wife." Cotton v. Luttrell, 1 Atk. 451.

The counsel for the defendant said, the principal question is, supposing Sir *John Chesbire* ought not to be examined where the wife is concerned, yet whether the evidence both of him and Lady *Chesbire* should not be read, as here is a third person who is greatly interested under the settlement of Mr. *Cotton*, and can produce no evidence so material as Sir *John Chesbire*, who had the framing and perusing of the whole conveyance: and the chief case relied upon for the defendant, was *Tyrrel v. Holt*, where *Ward* and *Wilbram* trustees through the whole estate (Sir *John Chesbire* being only a trustee to preserve contingent remainders), were charged with fraud, and yet the court of King's Bench, upon an issue of fraud, directed out of Chancery, admitted them upon solemn debate to be examined.

Lord Chancellor: The reason why persons who at law are put into the *simulcum*, are yet admitted as witnesses, is, that they may not be made

made parties to a cause only to take off their evidence; but notwithstanding this, if there is strong evidence against the *simulcum* man, that he is *particeps criminis*, the court will exclude him from being a witness.

When this objection was first stated, I must confess I was very doubtful, whether the depositions of Sir *John Cheshire* and Lady *Cheshire* ought to be read; but, upon the matter being fully discussed, I am of opinion that the objection goes only to their credit, and not to their competency.

As to Lady *Cheshire*, the objection depends upon these considerations, whether she has been properly made a defendant; now I will not say, she has been improperly made a defendant, because it was necessary in order to a discovery; but it was improper she should be brought to an hearing, for she is no ways concerned in interest in the event of this suit, and consequently no decree can be made against her.

I will not say but there might be care, where it was necessary to bring such a person to hearing; as, suppose A should by fraud obtain a conveyance for his own benefit, where it ought to have been in trust only, there might be a decree against such a person.

But this is a bill brought merely to have a reconveyance from the person to whom it is alleged the estate is fraudulently and illegally conveyed.

But if there is no decree against Lady *Cheshire*, how is it possible that costs should be given against her? for if she is no ways concerned in interest, there can be no decree.

The consequence of this is, that the objection goes only to her credit, and not to her competency.

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The next consideration is, as to Sir *John Chesbire*; and as I am of opinion, that Lady *Chesbire*'s deposition ought to be read, the reading his deposition is a consequence of it; for it would be very strange to reject his testimony, when there is not the least colour to say he was concerned in the fraud.

I do not know any case in this court where a feme covert has been guilty of a fraud solely, without the husband, and where he has no benefit at all from it, that he should suffer; it would be extremely hard to say, he should pay costs: I know of no precedent, nor do I believe the court would do it.

The depositions of Sir *John* and Lady *Chesbire* read accordingly.

A witness *incompetent* being interested, may on release given by him, whereby he becomes disinterested, be examined again; so a witness at the hearing rejected to be read because interested when examined, yet on a release given, was examined again before the Master on the account, and allowed good, on exceptions to the Master's report.

A bankrupt's servant was produced in behalf of creditors, to prove some dealings between his master and his debtors, but excepted against, because the bankrupt had paid him his wages *after* the bankruptcy, so that is no payment in law.

Lord Chancellor over-ruled this exception, taking the evidence to be good, and conse-

* *Callow and Menci's Prec. in Chan. 234.* Note, On an issue out of Chancery, one of the witnesses after his depositions taken, became interested, and confessing it now upon a *voire dire*. he was rejected, and his depositions were not allowed to be read. 1 *Strange 107.* *Baker v. Lord Fairfax.*

quently that the evidence was unbiassed; and said, *It was unreasonable that a servant should come in with the rest of the creditors* *.

If a man *unnecessarily* makes any one a defendant, he thereby cuts himself off from the benefit of his evidence, for it is his own fault: but where several are made defendants, it will not hinder any one of the *defendants* from the evidence of any *others* that are made so.

Gibson v.
Albert,
10 Mod. 19.

1 P. Will.

288.

Gros and
Tracey.

2 Vern. 287.

In a suit to establish a *former* will, A is examined by the then plaintiff as a witness to prove the ill practices made use of in obtaining a latter will; after which, and before the hearing of the cause, A becomes interested (by having a great charge devised to him out of the lands in question by the person claiming under the former will,) and plaintiff in the cause; and because A was a *good* witness, and *disinterested at the time of the depositions taken*, and the present bill being in nature of a bill of revivor of the proceedings of which the now plaintiff was examined, Lord Cowper admitted the *now* plaintiff's *own* depositions to be read.

Note, In the above case of *Gros and Tracey*, it was declared, that a *grantee*, when he appears to be a *bare* trustee, is good evidence to prove the execution of the deed to himself.

Parishioners are no good evidence to prove a charity given to the charity, because they

* *Humphrey's case*, MS. Rep. *Note*, In this case Lord Chancellor said, fair book-keeping, while the trade is in repute and credit, is good evidence, but rasures will abate the credit; and book-keeping, about the time the bankruptcy is committed, is not evidence. *Note also*, On an issue out of Chancery, to try whether a bankrupt had forfeited the allowance out of his estate by gaming, a creditor no witness to prove him a gamester. 1 Strange 507. 650.

are interested, as being eased in the poor rates; *secus*, if only a lodger, and one that does not pay to the relief of the poor: but a witness examined (being described to be of —, to the poor of which parish a charity was given,) must be intended an *housekeeper*, and one liable to pay parish rates, unless the contrary be made to appear*.

A bankrupt's wife cannot be examined against her husband to prove his bankruptcy; *Ex parte James, 1 P. Will. 611.* but may (by statute) touching discovering his effects: but the bankrupt himself may be examined touching his own bankruptcy, by stat. *Ibid. per Lord Chancellor Parker.*

5 Geo. 1.

I S makes his will and, *inter alia*, devises lands to A and his heirs, in trust to pay the testator's heir at law 200l. and there are three witnesses to the will, one of which is A the devisee. The heir brings his bill to impeach the will for want of three credible witnesses, in regard A, the devisee of the lands, is a party interested: and the question was, whether A was not a good witness, if he aliens the land without covenant or warranty? But the court said nothing as to this point, but that the heir ought to have contested the will at law, and if it had been adjudged against him there, *viz.* that the will was good, then he might have come here for the 200l.; wherefore Lord Chancellor Parker retained the bill for a year, that the plaintiff might have two assizes to try the bill,

* Per Lord Chancellor Parker, 1 Will. Rep. 599. Note, This was in the case of a sum of money given for the clothing of six poor persons of the parish of Endfield. *Modus* for tithe milk; it is a good objection to a witness, that he is an inhabitant of the parish where the *modus* is insisted upon; and if he is not in the occupation of any lands titheable, it lies upon the other side to shew it. Bunbury 40.

1 P. Will.
Rep. 557.

but the plaintiff to pay A (the defendant) his costs.

Barnard's
Rep. 416.

A *bare* trustee is a good witness for his *cestui que trust*, but *not* an executor *in trust**, as he is liable to be sued by creditors, and liable to pay costs, and consequently differs from a common trustee: so where a trustee is to account, he shall not be allowed to be examined as a witness in that cause.

3 P. Will.
Rep. 288.

It is a good rule at law, that where the plaintiff has made many persons defendants, and the *principal* defendant calls one of the co-defendants to be a witness; if the plaintiff cannot give some material evidence against him, he is allowed to be a good witness; *else* it would be in the power of the plaintiff to take off all the defendant's witnesses in the action: the same rule obtains in equity, and upon the same principle.

A witness appeared to be interested, but swore he had received satisfaction; and,

Per Curiam: He is not a *competent* witness; the law will not trust him to swear thus, but the release, or other act destroying his interest, must be proved †.

A bill was exhibited in this court concerning tithes and bounds of a parish, which proceeded to answer and replication: the plaintiff then exhibited another bill in the court of Exchequer, and witnesses were examined there; and now he proceeds again in Chancery, and replies: the defendant pleaded the proceedings

* 3 P. Will. 181. Note, But if an executor in trust renounces the executory part, and lets another take out administration with the will annexed, he may be a witness. Ibid.

† 2 Atk. 15. Note, Upon motion, you may have an order to examine to the credit of a witness, even before publication passes. Bunt. 46.

and examination in the Exchequer, and ruled good as to the examination of the same matters, which being examined to there, were not to be examined in Chancery. Cas. in Ch. 233.

The oath of a legatee, who had given a receipt under hand and seal for her whole legacy, was not allowed to be read in evidence, that she had only received part of it. Mosely's Rep. 40.

A bankrupt by releasing to the assignees may be a witness: but whilst he continues interested, he can by no means be a witness*: so a bankrupt's wife cannot be examined against her husband to *prove his bankruptcy*; but may *touching the discovery of his effects*†: and a bankrupt himself, by statute 5 Geo. 1. may be examined touching his bankruptcy. 2 Vern. 637.

Where there are several defendants named in the bill, some of which are not served with process, those not served may, upon order, be examined by either party; and if both sides examine them without order, it is well, for each hath thereby allowed them good witnesses. Cl, Tut. 7.

A defendant may, by motion of course, be struck out of a bill before answer, in order to be examined as a witness; and so he may after answer, upon payment of the costs of the dismissal as to him; but if he has answered, and the plaintiff is in doubt whether he will be a

* 2 Vern. 463, 464. And note, The affidavit of a bankrupt before a Master extraordinary in Cork, was allowed to be read. Mosely 78.

† 1 P. Will. 611. A wife by the common law cannot be a witness for or against her husband. 1 Inst. 6 b.; and though the statute of 21 Jac. 1. authorizes the commissioners to "examine the wife touching any concealments of the goods, effects, or estate of the bankrupt," yet neither does that, or the 5 Geo. 1. c. 24. extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bankruptcy, or how or when he became a bankrupt.

2 Chan. Caf.
214.

good witness or not, or whether he may upon hearing be found a necessary party, he may let him stand in the bill, and have an order to examine him *de bene esse*.

Toth. 94.

Though ordinarily the wife is not to be examined as a witness for or against her husband, yet in some cases it has been allowed, as to discover her husband's deceit, &c. ; so where the defendant had examined his own wife as a witness, it was ordered that the plaintiff might take a *subpœna* against her on his behalf, and if the defendant would not suffer her to be examined, then her examination on his part to be suppressed.

Cary's Rep.
135.

A guardian hath been ordered to be examined as a witness.

Toth. 109.

If a witness produced is not of competent understanding, the adverse party may except against him, and the commissioners ought not to examine him ; but if they, who have the carriage of the commission, will examine him, the other commissioners must certify the matter to the court, and make affidavit of the irregularity.

Pract. Reg.
361.

Pr. H. Ch.
137

A witness was excused from being examined touching articles concerning a lease of land whereof he had the reversion : so though a defendant is dropped by a plaintiff, who never replies to his answer ; yet he cannot be examined as a witness by the defendant, without an order of the court.

Pract. Reg.
362.

Where a defendant has answered, and disclaimed all interest in the matters in question, either party, on petition or motion, may examine such defendant *de bene esse*, which is a *salvo* to the other side for any just exception that

that can be made at the hearing against reading such witnesses.

Px. Alm.
22.

A trustee examined as a witness was afterwards thought necessary to be, and was made, a defendant: upon hearing, his depositions were not allowed to be read, though he should pay no costs, nor should gain or lose by the decree (whatever might be the issue of it), because the decree might be against him, and his depositions are to affirm his own act: so trustees shall not be examined as witnesses one against another: also if an administrator sue, or be sued, in this court, and pending the suit, the administration is revoked by his practice, to the end he may be examined as a witness, he shall not be examined.

Pract. Reg.
363.
Toth. 186.

1 Cl. Tut.
17.

Upon a commission to prove customs, parties interested shall not be examined; so a counsellor in the cause, or his clerk, are not to be examined as witnesses: also a solicitor or promoter of the suit is not to be examined; as where one being served with a *subpœna ad testificandum*, upon shewing to the court by affidavit that he was solicitor in the cause, was discharged of the *subpœna*, with an order that he should not be examined: but in a similar case, where one had been counsel or solicitor for the defendant in the cause, it was (perhaps more equitably) ordered, that he should not be examined on any interrogatories which might compel him to answer any matter which came to his knowledge as solicitor in the cause, but for any other matter he might be examined.

Toth. 39.
Ibid. 48.

Ibid. 117.

Cary's Rep.
81.

Pr. H. Ch.
121.

Note, The rule in these cases seems to be this: They shall not be compelled, nor ought, to be examined to the secrets of their clients' causes,

Cary's Rep.
127.

Pr. H. Ch.
148.

Ambler's
Rep. 272.

Ibid. 393,
394.

causes, or what they come to the knowledge of as counsel, &c. : so the complainant's attorney at common law was ordered to be examined touching the breaking off a seal from an indenture ; but not to *any thing touching his client's title*.

A father having imposed upon a trustee in a settlement, to give his consent to his execution of a power ; on a bill being brought to set it aside, the trustees were admitted to prove the imposition, but the father was not to clear himself.

Bill by *trustees*, in the nature of a bill of interpleader, to have several matters settled, and the direction of the court touching them : it was moved for one of the defendants, that he might examine one of the plaintiffs, to prove the sanity of a person at the time of his suffering a common recovery : and upon citing the case of *Gibson v. Smales*, 1741, before Lord *Hardwicke*, who upon such a bill being brought, gave one of the defendants leave to examine the plaintiff, a trustee, to prove certain remittances ; and,

It was ordered by Sir *Thomas Clarke*, Master of the Rolls, who sat for Lord Chancellor, saving just exceptions.

An order was made, that *Buck*, one of the defendants, should be examined as a witness for the plaintiff, saving just exceptions.

Buck was interested in the cause, but not in the matter to which he was examined : and it was insisted upon by *Buck's* counsel at the hearing, that the plaintiff having examined *Buck* as a witness, could not pray any decree against him : but the court said, suggestions in orders of this kind, *viz.* (*that the defendant is*

not

not interested) must relate to the matters where-
to he is examined; if he is examined to other
matters wherein he is concerned, he may demur:
and the court ordered *Buck* to account.

Ambler's
Rep. 583.
584.
Vid. Piddock v.
Browne
3 Wms. 288.

Query, The reason of the order, viz. That plaintiff shall not compel a defendant to assist, and in the same cause act adverse against him; and leave is given, saving just exceptions. It is not for his sake that leave is required; he has better protection against giving evidence against himself—he may demur. It is for the sake of other parties. The causes of exception can only come from the other defendants. If the matters he is examined to, go directly to affect himself, he may demur; and as to other matters, he is not concerned; therefore no care is taken of him in the order: he is safe in all events.

Ibid. 584.

A deposition of a *trustee* was admitted to be read as to the *quantum* of trust-money in her hands, which was given by a testamentary schedule to her daughter, under circumstances which were held to go to her credit, but not to competency.

Ambler's
Rep. 592.
and the
cases there
cited.

Even at law, you may in an action of trespass examine one defendant in favour of another defendant, where he is not interested in the event of the cause; but *there* he cannot be examined for the plaintiff, because by making him a party in the action, the plaintiff has precluded himself from the benefit of his evidence: this court goes farther, and you may not only read the deposition of one defendant for another, but for the plaintiff likewise; but if the defendant, who is offered as evidence for another defendant, may not *necessarily*, but by *possibility* only, be liable to costs, this is always a reason for refusing his evidence; because he is

3 Atk. 401.
per Lord
Hardwicke.

interested so far as to be swearing to excuse himself.

Ibid.

And so if a person will act in such a manner as to make himself a proper party in the cause, and liable *prima facie* to costs, though the only one present at an agreement, yet the rule must prevail against his deposition being read as evidence.

A bill was brought against M, to set aside a fraudulent assignment of an annuity from L to M, as being made for no consideration, and subsequent to an act of bankruptcy.

The plaintiff's counsel offered to read the examination of B, the defendant M's attorney, taken before the commissioners who acted in the commission against L, as an evidence of the fraud, and of an act of bankruptcy by L previous to the assignment of the annuity to M.

Master of the Rolls: I cannot allow the examination of B to be read to affect the interest of a third person; and am of opinion the plaintiff could not be entitled to this evidence, unless B had been examined in chief in the cause.

But his Honour permitted the plaintiff to read the examination of the defendant M taken before the commissioners, because the answer having set up a different right to the annuity from what he had before insisted on in his examination, the examination may in such case be read to shew the contrariety and inconsistency between the answer of the defendant M, and his examination taken before the commissioners.

3 Atk. 315.

The father of H, the plaintiff in the original cause, examined H to the merits; after his father's death, H brought a bill of revivor, and

and became a party interested; this (upon the authority of *Goss v. Tracey*) did not disqualify him from being an evidence. ^{2 Vern. 699.}

Though an attorney or counsel may demur to being examined, yet he may consent, and the court will hear his deposition. ^{2 Atk. 615.}

The reason you cannot examine any of the plaintiffs as witnesses in a cause, is, because if the cause miscarries, the plaintiffs will be liable to costs; and therefore their swearing is to exempt themselves, and it is their own choice that they are made plaintiffs, for without their consent they could not be made so; but defendants are forced into a cause, and if their being made parties should absolutely invalidate their testimony, it would be in the power of any one, who had a mind to oppress another, to deprive him of his defence, by making the most material witnesses defendants in the suit; and therefore any of the defendants to a suit may be examined as witnesses, saving just exceptions to their credit, &c. ^{1 Vesey, 61.}

So a co plaintiff, though but a trustee, cannot be examined as a witness for another plaintiff. ^{Prece. in Chanc. 411.}

Where a party examines his own attorney or clerk in court, the other side may cross-examine him relative to the same matter, but not as to any other points. ^{1 Vern. 239.}

A clerk in court, or solicitor, may be examined touching transactions antecedent to the commencement of the suit, and the knowledge whereof could not come to him as such; so a clerk in court may be examined to prove a deed. ^{2 Atk. 524.}

No person is privileged from being examined except of the profession; as counsel, attorney, ^{1bid.}

torney, or solicitors; not an agent, for he may
2 Atk. 524. be only a steward or servant.

A demurrer by a witness, for that he knows nothing but what comes to his knowledge as clerk in court, or agent for defendant, in relation to the matters in question in the cause, is not good; for it ought to conclude, *that he knew nothing but by the information of his client.*
Ibid.

What will be admitted as Evidence; what will not.

ALL letters, notes, deeds, copies of records, and other exhibits, proved by the depositions, may be read at the hearing; and though they stand proved in the depositions, they must be shewed forth in the court, if the party will have any benefit of them as evidence: but deeds, and copies of records *not proved*, may, by special order of court, (obtained upon notice and motion) be proved *vi-
vâ voce* at the hearing, so far as the execution thereof is concerned; *secus* as to letters or notes.
Pr. Alm. 23.
Cl. Tut. 15.
Pr. H. Ch. 19.

A licence to a schoolmaster to teach, granted by the bishop's chancellor, under seal, during the bishop's suspension, hath been allowed to be read as evidence.
Praet. Reg. 154.

If one defendant by answer confesses sufficient matter for the plaintiff, it shall bind himself; but is not ordinarily sufficient evidence to conclude or bind a co-defendant.
Pr. H. Ch. 20.
Toth. 19.

Proofs or evidences of matters not in issue, which go to the very right of the thing, may be offered at the hearing; and though the
 court

court will not decree upon a matter not in issue, which the court had not an opportunity of examining into, yet it will not decree against what it sees to be the mere right, but will sometimes order that matter to be tried by an issue at law, &c. and decree thereupon.

² Chan. Caf.
196.

It was declared by Lord Chancellor *Talbot*, that upon producing a bond or mortgage, this *prima facie* is good evidence of a debt; but that wherever there are manifest signs of fraud in the obligee, in such case he ought to be put to the proof of actual payment; and though he may happen thereby to lose some part of the money really due to him, for want of being able to make sufficient proof, this is but a just punishment of him for the fraud which he has been guilty of: so where a bond is given, and no interest appears to have been paid for twenty years thereon, it is *presumptive* evidence that the bond has been satisfied, unless something appears to answer that length of time*.

³ P. Will.
289.

Regularly, the answer of one defendant shall not be made use of as evidence against another defendant; but one defendant saying by his answer, that he was much in years, and could not remember the matter charged in the bill, but that I S was his attorney, and transacted this matter, and I S the attorney being made a defendant, and giving an account of the matter:

Here, upon a motion for an injunction, Lord *Cowper* said, these words in the first defend-

* ³ P. Will. 396, 397. Note, The producing a receipt for interest within twenty years, indorsed on a bond by the obligee (though the time when such receipt was written and signed did not appear, otherwise than by the indorsement itself), has been held sufficient to take off the presumption of payment. See the case of Lord Barrington v. Searle, in Parliament, February 1730, upon a writ of error from the Exchequer Chamber. ³ Bro. P. C. 535, ³ P. Will. 396. note (D.)

1 P. Will.
300.

ant's answer amounted to a referring to the co-defendant's answer, and for that reason the attorney's answer ought to be read, and accordingly was read against the first defendant.

In a matter that depends upon tradition, the evidence of ancient persons is properly admitted. 3 Atk. 578.

Ibid. 270.

Where the plaintiff charges a fact by his bill, which is denied by the defendant's answer, and the plaintiff examines only one witness to establish it, though the rule of the court is, where there is oath against oath, that the plaintiff shall not have a decree for relief upon this fact; yet this court, as well as courts of law, will so far lay stress upon the evidence of a single witness, as it serves to explain any collateral circumstances.

It was moved on the defendant's behalf, that certain witnesses of the plaintiff, who were to prove exhibits, might be examined *viva voce* at the hearing of the cause, and that an order of the late Chancellor for a commission to examine them in the country, might be discharged.

The motion was founded on two grounds:

First, The great importance of these exhibits to the merits of the cause, being receipts of the defendant, which he insisted were forged, and had denied in his answer.

Secondly, The bad state of health of the defendant, disabling him to go down into the country to attend the commission; in support of which an affidavit of his physician was read.

Lord Chancellor: I cannot allow the motion; the constant and established proceedings of this court are upon written evidence, like the proceedings upon the civil or canon law.

This

This is the course of the court, and the course of the court is the law of the court; and tho' there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions; and the examination has been to clear such doubts, and inform the conscience of the court.

There never was a case where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow *this*, yet the fixed and settled proceedings of the court cannot be broke through for it.

The utmost latitude the court have taken in this, is to allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits: but there never was a case where it was allowed on the application of the contrary party; if he is suspicious of fraud, he may notice, and may cross-examine the witnesses. 1 Atk. 444, 445.

Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the court that the original note was genuine, before you will be allowed to read the copy. Ibid. 446.

A question was made, whether a decree in a former cause, wherein the present plaintiff and defendants were parties, might be read on the part of the plaintiff; it being objected to, because no opportunity of cross-examination between co-defendants:

Lord Chancellor: I am very clear, that it may be read as evidence, though not as conclusive

2 Atk. 89,
50.

clusive evidence. It frequently happens that there are several defendants, all claiming against the plaintiff, and having also different rights and claims among one another; the court then makes a decree settling the rights of all the parties; but a declaration for that purpose could not be made if this objection holds; which would be very fatal, as it would occasion the splitting one cause into several.

Ibid. 140.

Where a lord of a manor brings a bill for quit rents, and produces an account in order to support his right, it must be proved to have been the account of some steward or bailiff, who, by marks against the particular *items* of receipts, appears manifestly to have collected them; and his name besides must be placed at the bottom; but if there are not such marks, nor any name of steward or bailiff, it may be only a paper of rents drawn out of any book by a lord of a manor himself, for his own private use, and is not evidence of any payment here, any more than it would be at law.

Ibid. 147.

Where the evidence of a single witness against a negative in a defendant's answer is corroborated by a great number of circumstances, it is sufficient to support an equity.

A bill was brought to prevent waste in digging and carrying away the soil in manors that lie in the levels in *Cambridgeshire*; and evidence of customs in a neighbouring manor were offered to be read, to shew the customs of the manor in question.

Lord Chancellor: It is certainly the rule of law in general, that the evidence of neighbouring manors shall not be admitted to shew the custom of another manor, because every manor is to be governed by its own customs; but

but this rule is not so universal as not to be varied in some instances; as in mine counties, *Derbyshire*, &c. the courts of law have admitted evidence with regard to the profits of mines, &c. out of the manors, where they are analogous and similar, to explain or corroborate the custom of the manor in question.

Now, in the present case, there is a great similitude in the manors, because this is a fen country, which is of very large extent, and the nature of fens and marshes throughout *England* is pretty much the same.

The custom here is to dig up the lord's soil for turf, which is a very odd custom if applied to any other soil; but fenny and marshy lands are often overflowed, and lie buried under water for seven or eight years, and produce no profit at all to the copyholder; and therefore, by way of compensation, when the water is drained, and the land improved from the additional soil brought by the floods, the copyholder may be entitled to common of turbary; and this seems to be a plausible pretence for such a right, and therefore the evidence offered by the plaintiff must be read.

2 Atk. 189.

A bill in another cause is not to be read in evidence against the person named plaintiff in it, unless it be proved, that it was exhibited with privity.

1 Chan. Caf. 64.

By the constant practice of the court, acts of the court, as a decree or order, in another cause between the same parties, may be read without an order.

Mosely, 183.

A deed was *executed*, and *altered by consent of parties*, and then re-executed; and *per Curiam*, This deed cannot be given in evidence

as

8 Geo. 2.
and Lee in
Chan. MS.
Rep.

as a *new deed*, unless it be stamped afresh, because the alteration vacates the whole deed.

Thomas Calvert, seised of lands in fee, had issue two sons, *James* and *William*, and one daughter, *E.* In 1704, he mortgaged the premises to the defendant, and died; and *James* went beyond sea, and was never heard of. Afterwards *E.* with her husband, conveyed the equity of redemption to the plaintiff, who brought his bill to redeem, and the *only evidence* of *James's* death was his *absence since 1704, and his not being heard of.*

Hil. 8 Geo.
2. 1734.
Masten and
Cookson,
MS. Rep.

Talbot, Chancellor, held this *good evidence* to intend his death, especially in the case of a mortgagee, for he has only a conditional interest in the land, and cannot be redeemed without paying principal, interest, and costs. Upon such terms, a redemption was decreed to the plaintiff.

Per Lord
Chancel-
lor, in the
case of An-
drews and
Waller.
1 Vin. Abr.
237. pl. 12.

The rule of evidence is the same in equity as at law; the proper evidence of surrenders, or title to a copyhold, is the court-roll, or a copy of it, or it must appear they existed once, and are lost, and so make way to go into parol evidence.

Gilb. Eq.
Rep. 183.

A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence, to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond.

Anon. 9
Mod. 66.

Exemplification of a sentence given in *Holland* shall be read as evidence *here*, to shew that such sentence was given *there*, but no *fur-ther*.

A settlement of A, under which the plaintiff claimed, being lost, but being proved in Chancery by the plaintiffs themselves thirty years

years since, who were not then concerned in interest, but are since intitled under that deed, it was ordered that a copy of the deed should be admitted to be read at law, and also that the plaintiff's depositions be read to prove the deed, although they now claim under it*.

Where an estate passes by the inrolment of a deed, (as in a bargain and sale), there the inrolled deed is evidence without further proof; but, where the inrolment is only for safe custody, there it is not, otherwise than against the party who sealed it, and all claiming under him, and so far it shall †.

Plaintiff's own proof of defendant's contempt allowed.

Nurse and
Guillem,
2 Freem.
Rep. 132.

It was argued, that depositions taken in a cause, where tenant for life only was a party, could not be made use of as evidence against the reversioner or remainder-man; and the Lord Keeper declared his opinion, that depositions taken in a suit, where tenant in tail was party, could not be made use of against the issue of tenant in tail; because he comes in by title paramount, *per formam doni*; and although tenant in tail hath a power over the estate, and may dispose of it, yet if he in a bond binds himself and his heirs, the issue in tail is not bound; but if tenant in fee is party to the suit, the depositions taken in such a cause may be read against his heir.

Easter 1703;
MS. Rep.

* Trin. 1702. Anon. MS. Rep. Vide also 2 Freem. Rep. 260. S. C. under the name of Lady Holcroft and Smith, 1 vol. Abr. Eq. 224. Ca. 5. S. C. and P. and more fully stated.

† 2 Freem. Rep. 249. Trin. 1702. Lady Holcroft and Smith, S. C. says on a question arising, whether an inrolled deed should be evidence without further proof, this difference was taken, 1 vol. Eq. Abr. 224. Ca. 5. S. C. but not S. P.

A purchases houses in B's name, but no trust is declared. A dies, and B gives a declaration of trust: this is good evidence of the trust.

Per Lord
Chan. Cow.
per in the
case of Am-
brose v. Am-
brose, 1 Will.
Rep. 321.
323.

Richard Jenkins and his wife being seized of an estate in right of the wife, by a fine, and by indenture of 6th January 1734, declare the uses to the husband and wife, and the survivor for life, remainder to the use of all or any of the children, in such shares and proportions, and for such estates, and payable at such times, as *Richard* by deed or will should direct, limit or appoint, and in default thereof to *Richard*, his heirs and assigns for ever.

Bill by creditors under the will of *Richard Jenkins*; cross bill by *Jenkins*, the son of the marriage, insisting, that by the settlement itself, and the construction upon it, the father *Richard Jenkins* cannot take the fee but in default of issue of the marriage; but if the settlement is not so upon the legal construction of it, yet that was the intent of *Richard Jenkins* at the time of making the settlement, (*without referring to any articles or instructions*,) and prayed to be let into possession.

It was offered on the part of the plaintiff in the second cause, to read instructions for drawing the settlement, that were sent by *Jenkins* the father, (the grantor) by which he declares, he is not to have the fee, unless there be failure of issue of the marriage; and objected upon the part of the defendant, because the settlement must speak for itself, and in case those instructions were given, yet there is no proof that they were not departed from, and the settlement is in itself perfect.

Lord

Lord Chancellor: If the bill had been brought to rectify the mistake, and make the settlement agreeable to articles or instructions, as is frequently done, and had pointed out those instructions particularly, they might have been read in evidence; for if those instructions had been departed from, it would give an opportunity to the defendant to shew it; but in the present bill, all that is insisted on, is, that the settlement is contrary to the intention generally, without pointing out the particular instructions. The proper and usual method is, to point out the articles or instructions where bill for rectification of settlement; not that it is to be laid down as a general rule, that no case can be so circumstanced as to make it unnecessary to point out the articles, as where the settlement itself refers to them. But this is the case of an infant, and I shall give him an opportunity to amend his bill, that he may have the benefit of those instructions.

In matters of trade, evidence of the usage or custom amongst merchants is admissible.

Ambler's
Rep. 147.
148.

Ibid. 184.
So in Ford

and Hopkins, Salk, 283. Lord Holt said, the way and manner of trade is to be taken notice of; and admitted evidence of the usage among *goldsmiths*, which was not all relative to the custom among merchants.

On a plea, a sentence in the ecclesiastical court *ex directo* in a matter properly cognizable there, is conclusive evidence where the same matter comes in question collaterally in a court of law or equity: And,

Per Lord Apsley, Chancellor: I lay it down as a general rule, that wherever a matter comes to be tried in a collateral way, the decree, sentence or judgment of any other court, having competent jurisdiction, shall be received as conclusive evidence of the matter so determined.

¹ Lev. 235. In *Noel v. Wells*, the court would not receive evidence to prove that the will was forged, in contradiction to the probate. All the cases cited import the same rule. Temporal courts must take notice of the forms of sentence in ecclesiastical courts: there is no end of citing cases on this head. The only exception to the rule is, where the sentence is not *ex directo*, according to the distinction in *Blackman's* case. It was said, that fraud in obtaining the sentence might be given in evidence: in *Barnesley v. Powell*, Lord Hardwicke took a distinction between fraud upon a testator, and fraud after his death. In the former case, he said, this court would not meddle; but leave it to the ecclesiastical court: and fraud upon a court in obtaining judgment or sentence can only be examined by the court where the fraud is committed, or another court having concurrent jurisdiction: this court has not concurrent jurisdiction in questions of marriage. Not one case has been cited where such a sentence has been held not to be conclusive while it stands.

Ambler's

Rep. 761. 2,

3. Meadows and wife v. Dutche's of Kingston and others, and the numerous authorities there cited.

Ibid. 54.

A legacy to poor dissenting ministers in any county was held not to be void for uncertainty, but evidence was admitted to prove who were entitled.

A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate; and a question arose as to reading the bankrupt's evidence; but the court suffered it to be read, he having had his certificate and allowance.

¹ Bro. Chan.

Rep. 269,

270.

A cer-

A certificate of a party's character under several persons hands, which were proved to be so by a deposition, was not allowed to be read as evidence; because the certifiers might have been *examined* as to the party's reputation: so the proofs made before answer upon a *certiorari* bill, are not to be made use of at the hearing, for they are only to give the court jurisdiction, and the defendant could not then examine any thing on his part.

Pract. Reg.
156.

Pr. H. Ch. 8.

An infant's answer by his guardian is not evidence against him, because the infant is not sworn, and it is only for making proper parties: and where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, and not on the infant: but where a defendant puts in an answer to a bill brought by an infant, who does not reply to it, in such case, it seems, the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses, to prove his answer, and he ought not to suffer for such omission in the plaintiff.

Castnew,
79.

Taylor v.
Atwood, 2
P. Will. 643.

So ruled at
the Rolls,

with some warmth, by Sir Joseph Jekyll, in the case of *Thurston and Deckan* an infant *versus* *Rutton & uxor*, Trinity 1733, though much opposed by the council for the plaintiff, for that the plaintiff being an infant could admit nothing; and it might be very mischievous, if by reason of the neglect of the plaintiff, the infant's guardian, or *prochein amy*, in not putting in a replication to the answer, such answer should be read, and admitted to be true, though never so detrimental to the infant's inheritance. *Idea quære.* 3 *P. Will.* 236.

But in the case of *Legard v. Sheffield and others*, 2 *Atk.* 377. where the plaintiff, an infant, had not replied to Lord Mountjoy's answer, who by his pedigree, makes himself to be one of the heirs at law to the Duke of *Buckinghamshire*, it was said by,

Lord *Hardwicke*, Chancellor, that if the plaintiff had been of age, it would have been

an admission of the facts in the answer; but an infant can admit nothing, and therefore his not replying does not affect him; and for this reason you must read the evidence of the pedigree, that I may judge whether it is clearly made out this defendant is heir at law.

By the rules of evidence, no entry in a man's own books by *himself*, can be evidence *for himself*, to prove his demand: but the courts of justice have gone so far (and perhaps broke in upon the original strict rules of evidence), that where there was such evidence by a servant known in transacting the business, as in a goldsmith's shop by a cashier or book-keeper, such entry supported on the oath of that servant, that he used to make entries from time to time, and that he made them truly, has been read: further, where that servant, agent or agents, usually employed in such business, was entrusted to make such entries by his master, and that it was the course of trade; on proof that he was dead, and that it was his hand-writing, such entry has been read (which was *Sir Bigby Lake's* case); and that was going a great way; for there it might be objected, that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind, the court has gone so far. There is no case, where an entry by the party himself has been admitted to be read, because it was merely his own declaration, unless *Wilkinson v. Hern**: but it was read there upon a different ground, viz. as evidence to shew the discharge

* 18th January 1744. Note, Lord Hardwicke, when he alluded to this case, said, he could not find he had taken any note of it, which might be from its being heard on exceptions, on which seldom any thing arose as matter of precedent. 2 Vef. 55.

or application of the money by the person making the payment; for it was a general payment, and the fact of payment not disputed. But whether there was such an authority or not, it is a reasonable distinction, that though an entry in a man's own books may not be evidence originally to prove a right, or the demand in question, yet where the sum is clearly made out to be paid out of his property, it may be evidence to prove the application of it; according to the rule, that whoever pays money, it must be received according to the direction and mode the payer imposes on it.

On exceptions to the Master's report, for allowing several notes to be brought into the account by the plaintiffs, assignees of *Cordwell*, a bankrupt, several issues were directed to try the validity of those notes. They were all found forged, in B R.

2 Vol. 54. 55.
per Lord
Hardwicke.
Vid. also
ibid. 193.

It was now said for the plaintiffs, that whether those exhibits were true or false, there was other evidence which made them immaterial.

Lord Chancellor: Whether this is a case of assignees under a commission, or of a person suing in his own right, I must go by the same rule. When issues are directed either on hearing of the cause, or on exceptions upon facts of this kind, it is afterwards taken to be decisive as to the fact directed to be tried, and as to the consequence of that fact, unless it is a distinct consideration; as where there was a double consideration, whether the deed was forged or not, and the consideration of equitable circumstances. It is now said, that whether these exhibits are true or false, there is other evidence which makes them immaterial: if the court should now go into that other evidence, there would never be

an end of things; therefore, for the sake of precedent, I will not do what is now desired by the plaintiff. The parties must abide by the defence they set up; and if they set up a forged defence, they must rest upon it, and cannot afterwards say, that piece of evidence is nothing to the purpose. Therefore I shall take this verdict to be conclusive upon all these exceptions, which must be all allowed in consequence of the verdict.

2 Vef. 580.

Lord *Hardwicke*, Chancellor, allowed an objection made to the reading receipts, proved *viva voce* at the hearing, to shew certain debts of A B paid by C D: on *plene administravit*, the defendant must shew something, that such a debt was due; and perhaps after a long distance of time, ancient receipts may be reasonable evidence, that there was such a debt; but as to proving exhibits *viva voce*, it is a certain established rule, that you can only prove the hand-writing of the person to that exhibit, or the hand-writing of the witnesses: but cannot enter into any examination whatsoever, that will admit of a cross examination.

Ibid. 480.

Lord *Hardwicke* laid it down as a rule, that where a person has an interest, it is not sufficient for him to say that he has been satisfied; he must produce a release, or his evidence cannot be read: so where a title is set up to an estate by a bill, and you make a person defendant, who disclaims all right, and do not bring him to hearing, the court said you shall not read his evidence as proof of your own right, to the prejudice of another defendant.

2 Atk. 15.
Anon.

2 Atk. 39.

Of

*Of the Examination of Witnesses to the Credit of a
Witness already examined.*

WHEN publication has passed, and the depositions are copied and delivered out, if either party conceive the evidence of some of the witnesses examined for the adverse party, to be objectionable either upon the score of credit or of competency, the plaintiff or defendant may examine witnesses to substantiate both or either of those objections; and if their testimony be discredited, or their incompetency sufficiently proved, the depositions of those witnesses so impeached, will not be permitted to be read in court at the hearing.

The leading step towards an enquiry of this nature is, the preparing and filing objections or articles in the examiners office, if the depositions impeached be taken in town; or in the six clerks office, where the deposition is taken by commission; and in either case the objections or articles, properly engrossed, should be annexed to the depositions in the respective offices where the depositions are filed; though it should seem, if the deposition objected to, be taken by commission, and the examination of the witnesses to the credit or competency be in town, the articles should be filed, as well in the examiners office, as in the six clerks office where the depositions are filed, and so *converso*.

These articles should state the substance of the objection to the credit or competency of the witness whose deposition is impeached: as in cases of felony, burglary, perjury, forgery, standing

an end of things; therefore, for the sake of precedent, I will not do what is now desired by the plaintiff. The parties must abide by the defence they set up; and if they set up a forged defence, they must rest upon it, and cannot afterwards say, that piece of evidence is nothing to the purpose. Therefore I shall take this verdict to be conclusive upon all these exceptions, which must be all allowed in consequence of the verdict.

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The Practice of the

standing in the pillory, or any other criminal case, that would disable the party from being a good witness at law (for the rule of evidence is the same in equity, as at law); if the party cannot be a good witness at law, no more can he be in equity; or these articles may be founded on the party leading a lewd life, or being a common drunkard, or swearer, or of ill repute and character in his neighbourhood, a common vagabond, a man not known, or who hath no abode (though these latter objections seldom come to any thing); for notwithstanding all this, the party is a legal witness, and therefore the court will hear his evidence, and judge of the credibility of it accordingly.

For. Rom.
147.

The articles may be in the following form; and being engrossed upon parchment with an half-crown stamp, the examiner or clerk in court, with whom the articles are left to be filed, will annex them to the depositions impeached, and file them accordingly.

Articles exhibited by *Josiah Jenkins*, complainant in a certain cause now depending, and at issue in the High Court of Chancery, wherein the said *Josiah Jenkins* is complainant, and *Stephen Asley* defendant, to discredit the testimony of *Frederick Francis*, *Ambrose Duke*, and *Simon Allwright*, three witnesses examined before Esq. one of the examiners of the said court, on the part and behalf of the defendant.

1. The said *Josiah Jenkins* doth charge and alledge, that the said *Frederick Francis* hath, since his examination in the said cause, owned and

and acknowledged, that he is to receive or be paid, and also that he doth expect a considerable reward, gratuity or recompence, or allowance, from the said defendant, in case, the said defendant recovers in the said cause, or the said cause be determined in his favour: and that the said *Frederick Francis* is to gain or lose by the event of the said cause.

2. The said *Josiah Jenkins* doth charge and allege, that the said *Ambrose Duke* and *Simon Allwright* are persons of bad morals, and of evil fame and character, and that they are generally reputed and esteemed so to be: and that the said *Ambrose Duke* and *Simon Allwright* are persons who have no regard to the nature or consequence of an oath; and that they are persons whose testimony is not to be credited or believed.

Note, If the depositions are taken by commission, the title of these articles is necessarily to be varied, as thus:

“Articles exhibited by *George Johnson*, complainant in a certain cause depending and at issue in the High Court of Chancery, wherein the said *George Johnson* is complainant, and *Alexander Gibbons* defendant, to discredit the testimony of *Patrick Blake*, *James Richardson* and *John Simcoe*, three witnesses examined by virtue of a commission issued out of the said court, to *Isaac Poole* and others, directed for the examination of witnesses in the said cause, upon certain interrogatories exhibited before them for that purpose. And which said witnesses were examined in the said cause on the part and behalf of the said defendant.”

These

These articles being filed, and a certificate thereof procured from the examiner, or the fix clerk, with whom they are filed, that they are so; the court, upon application by motion or petition of course, grounded upon the certificate, will give leave to the party applying to examine witnesses thereon, and a commission to examine witnesses in the country. The order being drawn up, passed and entred at the register's office (the counsel's brief, or the petition answered, being previously left there for that purpose), a copy thereof must be served upon the adverse clerk in court personally, or left with his agent at his seat in the fix clerks office, shewing at the time of service, the original order passed and entered. And a copy in like manner must be served upon the examiner, if the examination to the credit be in town, for "the examiner cannot examine any witnesses to invalidate the testimony of any witnesses, but by special order of the court, which is sparingly to be granted; and upon exceptions filed with the examiner without fee, and notice thereof given to the adverse party, or his clerk in court, together with a copy of the said exceptions, at the charge of the party

Ord. Chan.
305.

so examining." Interrogatories adapted to the inquiry intended, must be drawn and filed as in ordinary cases, and witnesses thereto examined either by commission, or at the examiners office; after which the depositions are to be published in the usual manner.

And the other party, who is to support the credit and reputation of his witness, may examine accordingly *toties quoties*, and the depositions must be published as in other cases: but this is
a case

a case which very rarely happens, and, generally speaking, it ends in nothing more than putting the party to an expence to no purpose.

A motion was made for a commission to *Cork in Ireland*, to examine witnesses to the credit and competency of a person who had given evidence in the cause, and against whose competency the party now moving, had exhibited articles after publication past.

The Lord Chancellor denied the motion, and said, it was never allowed to exhibit articles against the competency of a witness after publication, because this might have been objected to and enquired into upon the examination; and for this very purpose, the witness is to be shewn to the clerk in court of the opposite party: though at the same time he said, it might be reasonable to allow an examination to competency *after publication*, where the objection to the competency arose from a matter, that came to the knowledge of the party after the examination; and the proper way to apply for this, would be not by exhibiting articles, but by motion for leave to examine to this matter upon a foundation of ignorance at the time of the examination.

3 Atk. 643.

But as to the commission to examine in support of the articles which went to the *credit* of the witness; Lord *Hardwicke* said, the court will allow such articles to credit *after publication*, because the matters examined to in such cases were not material to the merits of the cause, but only relative to the characters of the witnesses; and yet no commission was ever granted into foreign parts to support such articles (and *Ireland*, tho' belonging to the dominions of the crown of *Great-Britain*, with respect to the jurisdiction of
this

this court, is considered as a foreign part), because this would introduce a certain method of delay; and if it was ever to be granted upon great necessity, and in a case of consequence, the only ground of it must be, that no person in *England* could swear any thing as to the credit of the witness: but the affidavit which has been read in this case to induce me to grant the commission, is silent as to this; so that there may be persons here who can speak both for and against the credit of the witness,

And as these applications are most frequently made for delay merely, his Lordship said, he should be extremely cautious how he granted them; and as there was no absolute necessity in this case, he denied the motion.

*The Examination of a Witness vivâ voce at the
Hearing of a Cause,*

IS admitted, when deeds, writings, or other documents essential to the justice of the cause have been neglected to be proved, before publication has passed in the suit; or where the plaintiff finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to an hearing of the cause upon bill and answer only. The defendant's answer in such case being taken as true in every point, no examination of witnesses is requisite; the proof therefore of deeds, letters, &c. must be by witnesses *vivâ voce* at the hearing of the cause.

The constant and established proceedings of this court are upon written evidence, like the proceedings upon the civil or canon law; and
though

though there are cases of witnesses being examined *viva voce* at the hearing, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the court.

There never was a case where witnesses have been allowed to be examined *at large* at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of the court cannot be broke through for it; and the utmost latitude the court have taken in this, is to allow the proving exhibits *viva voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits: but there never was a case where it was allowed on the application of the contrary party; if he is suspicious of fraud, he has notice, and may cross-examine the witnesses: so in cases of wills, this court never 1 Atk. 445. suffers them to be proved by examinations of witnesses *viva voce*; for it is not sufficient to prove a signing and sealing, but the sanity of the person, and all other requisites under the statute must be proved, and this cannot be done by *viva voce* examinations, because the defendant has a right to a cross-examination of the plaintiff's witnesses. 1 Atk. 203.

The rules in respect to *viva voce* examinations are extremely strict in this court: thus where the plaintiff had an order to prove a deed *viva voce*; at the hearing, it happened that all the witnesses to the deed were dead, and the plaintiff produced a witness at the hearing to prove their hands, and this he could

Prec. in
Chan. 64.

could not be admitted to do; but the Master of the Rolls put off the cause, and gave liberty to examine in the office to prove the deed, notwithstanding publication past.

Note, As to proving exhibits *viva voce*, it is a certain established rule, that you can only prove the hand-writing of the person to that exhibit, or the hand-writing of the witness, but cannot enter into any examination whatsoever, that will admit of a cross-examination.

a Vef. 480.

To authorise the examination of a witness *viva voce* to prove an exhibit at the hearing of a cause, an order must be previously obtained for that purpose. This order is to be procured by motion in court, or petition to the Master of the Rolls, praying leave to examine a witness or witnesses *viva voce*, at the hearing of the cause, to prove the signing of account by the defendant for the execution of certain deeds, &c. describing them, which is always ordered as of course, saving all just exceptions: the counsel's brief, or the petition answered, being left at the registering; and the order being therein drawn up, passed, and entered at the same office, a copy thereof, two days previous to the hearing of the cause, must be served upon the adverse clerk, by leaving a true copy of such order with him personally, or with his agent at his seat in the Six Clerks office, shewing at the time of the service the original passed and entered.

When the cause is called on, and the deed, &c. required to be proved, the original order, the deed, or other exhibit mentioned and described in the order, together with the witness to prove the same, must be produced to the register in court, who will administer the usual

oath, and examine the witness to the execution, &c. after which the deeds may be read in evidence in the cause.

It may not be unnecessary to observe, that no deed, &c. but that mentioned and described in the order can be thus proved at the hearing; nor can any deed, &c. be read, although it has been proved, if there be not an indorsement thereon signed by the commissioners or examiners, certifying the production and proof thereof before them, except such deed, &c. be proved *viva voce*.

The attendance of an unwilling witness to prove a deed, &c. *viva voce* at the hearing of the cause, may be enforced by process of *subpœna*, to obtain which it seems an order should be procured by motion in court, or petition to the Master of the Rolls as of course; for without an order, the *subpœna* cannot be obtained from the *subpœna* office, the counsel's brief, or the petition as answered, must be left at the register office, and be drawn up, passed and entered there; the order is to be produced at the *subpœna* office, when the *præcipe* for the writ is left at the office: the form of the *præcipe* may be thus:

"*Subpœna William Wynne* to appear in Chancery, returnable 23d *January*, to testify *viva voce* in court, according to an order of court for *William Shackfield*.

Bevan, solicitor.

Tested, 2d January 1790."

This writ is made returnable on a day certain, as well out of, as in term, pursuant to the order.

The Practice of the

The body of the writ is in manner and form the same as a *subpœna* to testify before the examiner.

The indorsement expresses the purpose for which it issues, in the following words :

“ By order of court, to testify *vivâ voce* in court for William Shackfield.”

Label : “ William Wynne to appear in Chancery, returnable 23d January, to testify *vivâ voce* in court, according to an order of court, for William Shackfield.”

The expence of this *subpœna* at the office is 5 s. if one or two defendants ; and 5 s. 6 d. for three defendants ; and no more than three can be put into one *subpœna*.

The return of this writ should be the day on which the cause is set down to be heard, the *subpœna* to hear judgment will sufficiently ascertain that time ; and this process to testify should not be applied for, until the *subpœna* to hear judgment is served, and the day for hearing exactly known ; and it should seem as if this *subpœna* should be applied for upon the foot of an order to examine *vivâ voce* at the hearing, or that it should be engrafted upon an application for an order to that effect.

A *subpœna* to testify *vivâ voce* at the hearing of a cause, requires the same personal service as a *subpœna* to testify in other cases ; every circumstance to be observed in serving the latter may be incidental to the former ; such as tender or payment of sufficient money to bear a witness's expences, service a reasonable time before the day, appear and give evidence, &c. : but without the order to examine *vivâ voce*,

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a witness attending pursuant to a *subpoena* to testify *vivâ voce*, cannot be examined; and therefore it should seem, that an application to examine *vivâ voce* should accompany or precede an application for an order to testify *vivâ voce*.

In the proofs of this cause, the plaintiff had proved a certain deed; and the defendant, on petition to the Master of the Rolls, got an order for leave to inspect the deed, (because, as it was said by the counsel in support of the order,) the deposition of the witnesses *referring* to the deed, made the same part of the deposition. And,

It was moved to discharge this order, for that the other side can have no right to see the strength of my case, or the evidence of my title, before the hearing; and if this were to be granted, such motions would be made every day, since it would be every one's curiosity to try to pick holes in the deed of settlement by which he is disinherited; and no such order in the like case was ever yet made.

Which the Lord Chancellor thought very reasonable, and therefore discharged the order.

2 P. Will.
210.

So where, at the hearing of the cause, it appeared, that the defendant had examined a witness to prove a deed executed by him to his brother, to whom he was administrator, and claimed to be a creditor by judgment, which judgment was said to be discharged by the deed so proved in the cause, the said deed being alleged to amount to a release; in consequence whereof, there would be assets to pay the debt due from the intestate to the plaintiff; and now the question was, whether the plain-

The Practice of the

tiff could compel the defendant to produce this deed ?

It was urged for the plaintiff, that he might ; for the defendant having proved it, and the witness having *referred* thereto by his deposition, the same was now become part of the deposition itself, and in the possession of the court ; and as the plaintiff could read any part of the *deposition* taken for the defendant, by the same reason he might insist on having the deed produced ; and that the Master of the Rolls had made many orders to the like purpose.

To which it was answered, that a deed was not part of the deposition, *unless mentioned therein* in *hæc verba* ; and that as to the deed, the defendant had proved, it remained at his election whether he would make use of it or not ; that accordingly it was so ruled in the case of *Calmady v. Calmady*, while the court would not oblige the defendant to produce a deed which he had proved.

3 P. Will.
34.

The Lord Chancellor held this to be the course of the court, and therefore would make no order for the defendant's producing the deed.

Ambler's
Rep. 145.

The cause came on to be heard last term, and was adjourned over to the next ; and now it was moved for liberty to examine, to prove a witness (to a deed material in the cause) being in *Scotland*, in order to prove the handwriting of the witness ; and granted, on affidavit of notice of motion. Lord *Hardwicke*, Chancellor, said, It was often granted to examine a witness *vivâ voce* during the hearing, as in *Ward* and *Blount* ; and he saw no difference in this case.

Of

Of Hearings upon Bill and Answer.

A CAUSE may be set down to be heard upon bill and answer, provided there be matter of equity admitted by the answer sufficient to found a decree upon; so that when the defendant hath answered, the plaintiff ought to advise with his counsel concerning the answer; and if he finds that upon the answer alone, without farther proof, there be sufficient ground for a decree, he may then proceed to an hearing upon bill and answer, without lengthening the cause further.

The method of hearing a cause upon bill and answer is generally thus: after the substance of the bill has been opened by the junior counsel, and the matter of equity thereof duly represented to the court, the answer of the defendant is to be stated in the same manner by his counsel, and must be admitted true in all points, as to the particulars charged in the bill; and no other evidence is to be given than what arises from the answer itself, or being matter of record, to which the answer refers, and which is proveable by the record. But,

Note, In many cases, though the cause requires no witnesses, yet it may be necessary for the plaintiff to reply, &c. whereby the defendant will be put upon proof of his answer, and the plaintiff admitted to prove the matters of the bill.

If a deed or will is confessed by the answer, and referred to, there ought to be no replication; but the plaintiff ought to proceed there-
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upon to an hearing upon bill and answer; and if a trust is confessed by the answer, there needs nothing further but to go to an hearing, and the court will refer the accounts of the trustee to be stated by a Master; and when that is done, decree a discharge of the trustee on his paying the balance; the costs between the parties in that case being usually reserved by the court until after the Master shall have made his report.

* Toth. 50.

Though the plaintiff happens to need no witness on his part, yet it may be sometimes necessary to reply, and put the defendant upon proof of somewhat in his answer, as if he confesses the matter alleged by the plaintiff, or sets forth some further matter in bar of the plaintiff's equity; but there the plaintiff is to reply to *that particular matter or point only*, on pain of payment of costs for the copies, or otherwise as the case shall require.

P. act. Reg.
317.
P. x. Alm.
14.

Ord. Chan.
322.

If the plaintiff go to an hearing upon bill and answer, and the court shall not see cause to make a decree thereupon for want of sufficient matter confessed by the answer, the bill shall be dismissed with costs, or the plaintiff may be admitted to reply, if he desires it, (paying down 5l. or such other costs as the court shall think fit for the day,) within four days after such hearing; which, if he does not, the dismissal must stand; and, being signed and inrolled, may be pleaded in bar to a new bill for the same matter.

Pract. Reg.
317.
P. x. Alm.
14.

If the plaintiff reply to an answer, and without rejoinder*, or rules given for producing witnesses and passing publication, brings the

* Note. A cause is at issue by the replication, and a rejoinder is never actually filed. Mosely, 298.

cause

cause to an hearing, the answer shall be taken wholly true, as if there had been no replication; for the defendant's opportunity of proving his answer is taken from him: so where the defendant disclaims, or doth not answer, but pleads or demurs, the plaintiff is not to reply without arguing the plea or demurrer; and if he serves the defendant with a *subpœna* to rejoin, the defendant may have costs for the unjust vexation. 1 Chan. Cas. 21.

If a *subpœna* to rejoin be not served, though it be sued out, the cause may be heard upon bill and answer*.

Of the Dismission of Bills — First, *When the plaintiff does not appear.* — Secondly, *For want of prosecution.* — Thirdly, *Where there are not proper parties.* — Fourthly, *When the plaintiff sues for the same thing both at law and in equity.* — And first,

When the Plaintiff does not appear.

A DISMISSION is a final sentence of the court, whereby the plaintiff's bill or suit is ordered to stand dismissed.

Pract. Reg.
142.

When the cause is called on, and the defendant's counsel is ready, and appears, and nobody appears for the plaintiff, the court always calls upon the defendant to prove service, and if he cannot do that, he cannot pray

* But note, If the plaintiff replies to the defendant's answer, but never serves him with a *subpœna* to rejoin, he may rejoin again, in order to prove his answer, though the plaintiff cannot force him to rejoin without a *subpœna*. *Mosely, 123. pl. 77.*

The Practice of the

to have the bill dismissed; all the court can do in this case is, only to strike the cause out of the paper; but if the defendant proves service, the bill must be dismissed with costs; this service must be upon the oath of the party, *viz.* "That he was on or about such a day served with a *subpœna* to hear judgment, at the plaintiff's suit;" or any other person with whom the *subpœna* was left may make affidavit, and it must be filed before it can be read: the reason of this is, because a plaintiff may set down his cause, and yet upon further consideration of the matter, he may not think fit to serve the defendant with a *subpœna* to hear judgment; in this case the defendant must hear the cause *ad requisitionem defendentis*, if he will have the bill dismissed with costs, though sometimes the defendant is caught there too, and a decree made against him.

Before appearance, the plaintiff may obtain leave to dismiss his own bill; so after appearance, and before answer, or after answer, and before the parties have examined witnesses, the plaintiff may generally of course, on motion, have leave to dismiss his own bill with costs; and if the plaintiff dismiss his own bill, or the defendant dismiss it for want of prosecution, the plaintiff must, by the late statute for amendment of the law, pay full costs, to be taxed by a Master.

Secondly, Bills are dismissed

5 Ann.
c. 10.

For

For want of Prosecution.

WHEN a bill is filed, and a full answer put in thereto, if the plaintiff does not proceed in his answer in three terms, the defendant may in that case move (as of course) to dismiss the bill for want of prosecution, with costs, to be taxed by a Master, but he must produce the six clerk's certificate of the filing the answer, (and the six clerk certifies that since that time there have been no proceedings in the cause, as appears by his books): this certificate however is never called for; the counsel who makes the motion is supposed to have, and in truth always has, it in his hand, for he cannot move without it: the Master taxes these costs, and they are recoverable by *subpoena*, as in other cases where costs are to be paid by either party; the ancient rule was, that a man might dismiss his own bill on paying 20s. costs; but this, in process of time, was found so great a grievance, that the legislature took notice of it, and made an act of parliament, that no bill should be dismissed, but on payment of full costs, to be taxed: the party, it is true, may move, and often does, to dismiss his own bill with costs to be taxed; and as this is a motion of course, so it is tantamount to the defendant's moving to dismiss the same, it only prevents the defendant's moving for that which the plaintiff had done for him.

But though this proceeding of dismissing bill for want of prosecution, with costs, is laid down as an established rule of the court, yet cases

4 and 5
Ann. c. 16.
sec. 24.

The Practice of the

cases may be found out where it will not hold good.

As for example, where a bill is filed against several defendants, it often falls out that one defendant answers in due time, when another defendant is forced to be prosecuted for want of an answer, and the plaintiff cannot proceed in his cause till all the defendants answers are come in; and therefore whenever this case happens, and when it appears to the court that the plaintiff is going on with his suit, and prosecuting for want of answers, it has always been allowed a good cause to discharge the order of one single defendant, under pretence of dismissing the bill as against him for want of prosecution; and this is grounded upon the highest reason, because the plaintiff cannot proceed with effect in his suit till all the answers are in; and because it often falls out, that one defendant's answer comes in due time, when the answers of the other defendants cannot be got under six or twelve months after filing the bill, or at least not sufficient ones. To say that because one defendant hath fully answered, and is not proceeded against, that therefore the bill *quoad* him ought to stand dismissed, when at the same time the plaintiff wants an answer from the other defendants, and without it cannot proceed to have a complete decree, is, what was never yet allowed of; for where a plaintiff is prosecuting for want of answers, one single defendant shall never dismiss the bill during the prosecution.

And though a bill is dismissed for want of prosecution, yet the plaintiff may move to retain his bill on payment of costs out of purse; but in this case he ought to proceed with effect

fect in his cause, which, if he fails in it, will come a second time to be dismissed for want of prosecution, with costs, to be taxed by the Master; but after joining in commission, the defendant hath no method left to get rid of his cause, but by obtaining a commission; and after the depositions are returned, to get a rule *ex parte* entered to pass publication, and the cause set down and heard at his own request.

Note, In the Exchequer, if the plaintiff doth not reply to the defendant's answer, some time the next term after the answer is put in, the defendant may, the term following, give a rule to be dismissed within a week; and if the plaintiffs shall not, within that time, reply to the defendant's answer, the defendant shall be dismissed with costs. But if the defendant does give a rule to be dismissed for want of a replication, upon the coming in of such replication, the defendant is to rejoin *gratis*, and join in commission; and if the plaintiff doth not the same term, or the term following, take forth a commission to examine witnesses, the defendant must either take out a commission *ex parte*, or else be dismissed with 5 l. costs; and in all cases where the defendant shall give a rule, either for not replying to the defendant's answer, or for not proceeding after replication, if there be not a week in term, the plaintiff is to have a day to shew cause, till the setting down of causes.

Before 4 *Ann. c. 16. sec. 24.* for the amendment of the law, this court, upon motion, used to dismiss bills for want of prosecution, with 20s. costs; but the act has provided, upon the plaintiff's dismissing his own bill, or the defendant's

defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant his full costs, to be taxed by a Master.

But, since the act, another inconvenience has arisen, which should make the court incline, as far as they can consistently with their own rules and justice, for dismissing bills with costs, to be taxed; and that is, a man's bringing a bill upon a frivolous account, who, in order to keep his cause alive, replies, and afterwards moves to withdraw his replication, and that he may be at liberty to amend his bill; and, if the motion is granted, he then sets it down upon bill and answer only, that it may be dismissed with 40s. costs, which is evading the justice of the court; for otherwise, if he had not withdrawn his replication, he would have paid the full costs.

Therefore Lord *Hardwicke*, Chancellor, seemed inclinable to alter the course of the court with regard to 40s. costs only, in cases of dismissal *upon bill and answer*, as it is a hardship upon the defendant to be put to great expences with motions and other interlocutory proceedings, and yet not be allowed more than 40s. costs. And, accordingly,

Ordo Curia,
Easter
Term, April
27, 1748.

The Lord Chancellor altered this day the course of the court in regard to dismissing bills, where the cause is set down *upon bill and answer only*, or where it is so set down after withdrawing a replication, and ordered, that for the future it should be left to the discretion of the court, according to the merits of the case, to dismiss the bill with 40s. costs, or costs to be taxed by a Master, or with no costs; and an order drawn for this purpose was ordered

ed to be read in court; and his Lordship directed it afterwards to be fixed in the register's office.

2 Atk. 239.

If a plaintiff obtains an order to amend his bill, which he does not do in a reasonable time, yet this shall not be such a proceeding as to keep his bill on foot, and hinder its being dismissed for want of prosecution.

On dismissing a bill before replication, it is not necessary to serve a notice of motion, but it is usual only for the clerk in court to leave a note at the seat of the adverse clerk with himself, or agent there, that he will dismiss the bill for want of prosecution, and so get the fix clerk's certificate on which the motion is grounded, and moved of course, without any affidavit; but after a replication put in, if the plaintiff ceases all manner of prosecution for three terms exclusive, the bill may, upon the fix clerk's certificate, and giving notice of motion, and an affidavit thereof filed, (if not defended by plaintiff's counsel,) be dismissed.

Note, If at any time the cause rests for a year, the plaintiff must serve the defendant with a *subpœna ad faciendum attornatum*, unless the defendant's clerk in court will voluntarily appear, though it is thought fair practice, if the defendant be living, to go on without such service; and the reason of the *subpœna ad faciendum attornatum*, was, because the defendant might be dead in so long a time, and therefore they thought the first appearance by the clerk in court not sufficient to found any other acts of the court on, unless a clerk in court would appear for him; and then it was presumed that the defendant was living.

Thirdly, Bills are dismissed

For

For want of proper Parties.

IT has already been observed, that in all suits great care should be taken, that there be proper parties for and against whom the court may respectively decree.

Gilb. Chan.
157.

If the defendant objects for want of parties (as he may), unless restrained by some interlocutory order, whereby he is to take no advantage for want of parties; this is always to be done when the pleadings are opened, and before the cause is gone into upon the merits.

If it appears to the court, that a very necessary party is wanting, that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings, that the defendant is only a tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees (none of which will be bound either by the decree or by the account to be taken of the testator's assets), and each of these legatees may claim the account in question over again at their leisure; or where several persons are entitled as next of kin under the statute of distributions, and only one of them is brought on to an hearing, or where a man is entitled to the surplus of an estate *under a will*, after payment of debts, and is not made a party; or where the real estate is to be sold under a will, and the heir at law is not brought on; in these and all other cases, where the decree cannot be made uniform

uniform and complete; for as, on the one hand, the court will do the plaintiff right, so, on the other hand, they will take care that the defendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties at first, and whose fault it was that it was not so done; and therefore in all these cases the ancient rule was to dismiss the bill with costs, for want of necessary parties.

The present course of the court for some time past hath been and now is, to let the cause stand adjourned over on payment of the costs of the day, and to direct the plaintiff to amend his bill, by adding proper parties; and in many cases this is a very just rule and determination; as where the party wanting to be brought on is purely a party *pro forma*, as in the case of a trustee or an executor, against whom there needs no further examination of witnesses: nay, the court often directs to supply the want of parties, in case of an administration *de bonis non*, &c. that upon the plaintiff's producing such an administration, or probat of a will, before the Master, the account shall go on.

But where the party which is wanting is a substantial and necessary party, and where he may controvert the plaintiff's very right to the demand in question, and where he may deny it by his answer, and put the plaintiffs and the other defendants who have answered, to undergo a fresh examination of witnesses; and the plaintiffs must reply to this new defendant's answer, and both parties examine all over again; and when the cause must also be set down *de novo*, as against this new defendant:

ant: in such case, it should seem that the bill ought to stand dismissed, with costs, and that the defendants, who are unnecessarily brought on, should at least have their costs for this vexation; and that the plaintiff ought to be at liberty to bring a new bill, and make proper parties, as he shall be advised; but this is wholly in the discretion of the court; for where a bill wants proper parties, it is in the power of the court to dismiss the bill *sans* prejudice, or to give leave to amend, paying costs.

2 P. Will.
428. A

And said by Lord *Hardwicke*, Chancellor, that a bill in Chancery is never dismissed for want of parties, but stands over, upon paying the costs of the day. And,

A decree of Sir *Joseph Jekyll's*, in a cause at the Rolls to dismiss a bill for want of parties, was reversed afterwards for that reason; and a decree of the same nature in the court of Exchequer, was reversed likewise in the House of Lords.

2 Atk. 75.

Fourthly, Bills are dismissed,

When the Plaintiff sues as well in this Court as at Law for the same Matter.

A CAUSE may be dismissed for vexation by reason of a double proceeding, as if the plaintiff first brings an action at law, and then his bill in this court for the same thing, &c. though he may proceed here, his proceedings at law being stayed by injunction; and if the plaintiff forbear prosecuting his suit here, or does any thing which seems to make himself a judge of the matter in question, these are causes of dismissal.

As

As concerning elections to be made, where a man brings his action at law, and his bill in equity, for the same matter, defendant must first answer the bill, and then put the plaintiff to his election in which court he will proceed; and this is a motion of course, he has by the order served on the clerk in court eight days, to shew cause against making his election; if he elects to proceed at law, his bill in equity stands dismissed with costs.

If he chuses equity, then an injunction issues to stay his proceedings at law; this election is filed in the report-office, and signed by plaintiff's clerk in court, and is the authority for making out the injunction: but still this election does not hold in all cases, for if the suit in equity is not for the same matter, there shall be no election; if the bill is a bill of discovery, and no relief sought thereon, there is no election, for perhaps on that discovery he may be able to proceed in law, and without it cannot.

Upon this head there seems to be a plain failure of justice; as for example, suppose the plaintiff elects to proceed in equity, and his bill upon hearing is dismissed, either with or without costs, all the benefit the defendant, who is doubly vexed by it, has, is only to have his costs, and plead it in bar to any new bill brought against him for the same matter, (for a dismissal upon an interlocutory order is not pleadable,) but his injunction for staying proceeding at law is gone by the dismissal, and the plaintiff is in that case at liberty to proceed at law, which the court never intended when they put him to his election; now he elects to take his fate in equity, finds that

court against him, and when he has done there, he may take another turn at law, which is a great hardship, and it were to be wished, that the wisdom and justice of the court would remedy it; for the order of election is, that the plaintiff is prosecuting at law and in equity for one and the same matter, and therefore he is called on by the justice of the court to elect in which court he will proceed, but still he is not to proceed in both courts.

Gilb. Rep.
in Eq. 183.

2 Vern. Caf.
24.

3 P. Will.
90.

Mosely, 210.
pl. 19.

A plaintiff here may either make a general election to proceed at law, or a special election, as to proceed for part here, and the other part at law, but the court will judge of the reasonableness of that special election; but a dismissal upon an election to proceed at law is not peremptory, but the plaintiff may, after he has failed at law, bring a new bill.

But though the plaintiff, who sues both at law and in equity for the same thing, will be put to make his election in which court he will proceed; he need not however make such election till the defendant has answered: so an order for a plaintiff to make his election was discharged on motion, because the defendant had pleaded the statute of limitation, and the plea had not been argued.

The order for making an election recites only that the plaintiff prosecutes the defendant at law and in equity for one and the same matter, so that the defendant is doubly vexed; wherefore it provides, that the plaintiff, his clerk in court, and attorney at law, having notice of the order, within eight days after such notice make his election in which court he will proceed; and if he elects to proceed in this court (the Chancery), then the proceed-

ings at law are by that order to be stayed by injunction; but if the plaintiff shall elect to proceed at law, or in default of such election by the time aforesaid, his bill is to be dismissed with costs. And *note*, If one makes a special election to proceed at law as to part, and in equity as to other part, with regard to what the plaintiff in equity elects to proceed at law, his bill ought to be dismissed with costs.

The plaintiff filed a bill in the Exchequer, which was dismissed, and now brought the same bill in this court, which the defendant moved might be dismissed with costs; but the Lord Chancellor, on consulting the register, said, it could not be dismissed on a motion, but the defendant must plead to it; and then it is referred to a Master, to see whether it is the same bill or not; but if a bill is depending here, and a second brought for the same matter, the defendant may move, that it may be referred to a Master to see whether they are the same, and to dismiss one.

Mo'elv. 268.
pl. 154.
Anon.

Action was brought on a bond for 1500l. and judgment obtained; a *fi. fa.* issued against the defendant's goods, and *nulla bona* returned; after that the plaintiff, finding the defendant had some public stock in trustees names, filed a bill to subject it to the payment of her debts; the next term after the bill was filed, and before an answer was brought in, the plaintiff arrested the defendant's body by *ca. sa.* and he being now in custody, it was insisted on the part of the plaintiff, that she might have her election to waive the *ca. sa.* and have satisfaction by a decree out of the trust-money; and it was said to be like the case where a creditor proves his debt under a commission

The Practice of the

of bankruptcy, and proceeds by action at law, he shall be bound to make his election.

Lord *Hardwicke* took it up on hearing plaintiff's counsel, and dismissed the bill without costs. Where there is an equitable demand, and the party is taken in execution on a decree, this court will notwithstanding issue all its process against his land and effects, and the body being detained is not, in this court, a satisfaction; the reason is, because he is detained for the contempt; but at law the detaining the body is a satisfaction; and you cannot afterwards take his goods: this bill is not founded on an original equitable demand, but is brought in order that this court may extend its power to reach what the common law cannot; the stock to be sure is not liable on the *fi. fa.* but supposing it had been in the defendant's own name, the taking his person in custody had certainly protected the stock: this is matter merely at law, and the plaintiff has taken defendant's body by *ca. sa.* after the bill was filed.

Ambler's
Rep. 79.
Vid. also
Baleh v.
Wastall,
1 Will. 445.

N. B. If the plaintiff had not taken out *ca. sa.* the bill had been proper to subject the stock in the hands of the trustees.

Besides the causes which have been already considered, as operating to the dismissal of a bill before the hearing, it frequently happens that a bill is dismissed

Upon

Upon the Hearing.

AND this dismissal is sometimes for want of parties, or because the matter belongs to another *forum*, as to the courts of law, or ecclesiastical courts, or that the consueance of the cause belongs only to another court of equity, or that the matter in demand is below the dignity of this court, either in respect of its value, or in respect of its nature; which last is such as in itself is dishonest, or is ordinarily accompanied with something of fraud, corruption, or oppression, or hath an evil tendency, as well upon the merits as for want of equity in the cause: and if the dismissal be upon full hearing, and drawn up, signed, and inrolled, it may not be altered, by any motion or order afterwards for retaining the cause, but by a bill of review, nor shall a new bill be admitted but upon new matter (like as the case of a bill of review) and special order of the court.

Pract. Reg.
142.

3 *Px. Alm.*
12. 3.
Px. Alm.
27.
Toth. 50.

Probable cause of suit may induce the court to spare costs, when the plaintiff is dismissed on the hearing, though if on such dismissal there appears no such probable cause, &c. the plaintiff commonly pays full costs to be taxed.

Upon a dismissal with full costs, the costs are to be taxed by the Master to whom the taxation is referred, and his report is to be had therein; and then, without confirmation of the report, the same being filed with the register, you may have a *subpæna* for your costs, upon which, if they are not paid, process of contempt shall issue, as in other cases; and

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where a bill is regularly dismissed of course, or by order, for want of prosecution, &c. the same cannot be retained without special order of the court, which is seldom ordered without some extraordinary reason be given; and in that case the court orders the plaintiff to pay such costs to the defendant as they think proper.

If the plaintiff disavows or disowns the suit, the bill shall be dismissed without costs against him, upon notice of the motion to the defendant, if he shews no cause to the contrary.

The plaintiff may either come into court and disavow the suit, or by warrant to counsel under hand and seal, disown and disclaim it, as being brought without his order or privity, and may empower some counsel to move and consent that the bill be dismissed: the court, in case of such warrant, orders it to be filed in court; but if in such case there be more plaintiffs than one, the bill will be dismissed only as to him who disowns the suit.

Suits grounded on nuncupative wills, long leases tending to perpetuities, estates purchased, brokages for marriages, agreements for plays or wagers, bargains for offices contrary to the statute of *Edw. 6.* or for simony or usury, are dismissed on motion, if they take up the whole matter of the bill, and no special cause to induce the court to allow procedure.

When a cause is brought to hearing after issue joined and witnesses examined, the court sometimes makes a decree for the plaintiff as to some points contained in his bill, but dismisses his bill as to other points, and sometimes orders the plaintiff to pay costs to the defendant

defendant for so much of the bill as is dismissed, to be taxed by the Master; and sometimes orders the defendant to pay the plaintiff costs, to be taxed for so much of the bill as is decreed for him, as the court shall adjudge proper.

Note, A cause being ended by agreement or arbitration, without proceeding on the bill, order will be given to dismiss the bill; and where the bill is regularly dismissed of course, or by order, no motion will be admitted for retaining it without certificate from the defendant's clerk in court, that the costs of the dismissal are paid.

Of the Decree.

WHEN the cause has been heard upon full and solemn argument by counsel on both sides, the court proceeds to pronounce its decree, which is the final sentence or order of the court, determining the rights of the parties in the matters in litigation, and dispensing justice between them, agreeable to equity and good conscience: the decree is pronounced in open court, and is minuted down by the register, who sometimes reads the same to the court, in order that if any mistake happen to be made therein, the same may be immediately rectified.

The decree being pronounced, the party in whose favour the same is made carries the brief, given to one of his counsel, to the register of the day, when the cause was heard, (for each register takes his turn alternately,) and bespeaks the decree to be drawn up, and

The Practice of the

the adverse party usually bespeaks a copy; each party draws up the decree as he finds it most in his client's favour; and when the decree is drawn up, and the copy returned to the register, (if there is any difference about the decree,) the register appoints a day to hear both parties upon it, before the same is passed; or if either party refuses to return his copy, the register sends him a note to return it by such a day, or he will pass the decree without him; and this is done to give all parties an opportunity of pointing out any errors or objections which he may have, and which the register can rectify.

If the minutes taken at the hearing are doubtful, or if either party thinks himself really aggrieved by the decree, as it is then going to be passed, or if he conceives the minutes to have been inaccurately taken, or contrary to the plain sense and meaning of the court, when the decree was pronounced, in either of these cases an application should be made *before the decree is passed*, either by motion or petition, that the minutes of the decree may be rectified, stating therein the specific matter to be added or altered; and upon hearing and consideration of the argument on both sides, the court adopts or rejects the alteration proposed.

When the decree is passed by the register, an entry thereof in the entering books in the register's office, is, in the next place, necessary to be made; and it is to be observed, that *passing and entering* the decree are essentially requisite to the perfect completion of it, and necessarily antecedent to any subsequent or further proceedings being had thereon; for un-
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less the original decree appears to be entered, or an office copy of the decree, passed and signed by the register, is entered in the room of it, no subsequent proceedings, according to the directions of the decree, can regularly be pursued, nor the decree itself carried into execution; and if any proceedings are had inadvertently, they are irregular and voidable, and the same, by a proper application to the court, will be set aside for irregularity: if the party in possession of the original decree neglects or refuses to enter it, the office-copy, regularly passed and signed, may be entered in like manner as the original; and where any delay appears in perfecting the entry of the decree, the office-copy of the original decree, upon application to the register, will be signed by him, if the original has been previously left at the entering-books; and the office-copy so authenticated will be sufficient to authorize any proceedings in pursuance of the decree.

All decrees made in *Michaelmas* and *Hilary* terms are to be entered before the first day of the *Michaelmas* term next following; and all decrees made in *Easter* and *Trinity* terms are to be entered before the first day of the *Easter* term next following, or otherwise the party entering decree will be obliged to procure an order to enter them *nunc pro tunc*, the application to the court for which order is always upon notice previously given to the adverse party to prevent surprize: and all decrees and dismissions pronounced upon hearing the cause Gilb. Chan. 163. in this court are to be *drawn up, signed, and inrolled*, before the first day of the next *Michaelmas* or *Easter* term after the same shall be pronounced respectively, and not at any time after, without

Ord. Chan.
142.

Pract. Reg.
123.
3 P. Will,
111.

without special leave of the court: and the decree, until the same has been drawn up and signed and inrolled, has the force of an interlocutory order only, and is not final, but may be altered upon a rehearing, or sometimes upon motion or petition.

A decree is either final or interlocutory.

A decree is final when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained by the pleadings on both sides, that the court is enabled from *thence* to collect the respective merits of the parties litigant, and upon a full consideration of the case made out and relied upon by each, determines between them according to equity and good conscience.

A decree is interlocutory, when it happens that some *material circumstance or fact*, necessary to be made known to the court, is either not stated in the pleadings, or so imperfectly ascertained by them, that the court by reason of that defect is unable to determine *finally* between the parties; and therefore a reference to, or an inquiry before, a master, or a trial of the facts before a jury, becomes necessary to have the doubts occasioned by that defect removed; the court in the mean time suspends its final judgment, until by the Master's report, or the verdict of the jury, it is enabled to decide finally.

It very seldom happens, that the first decree can be *final*, or conclude the cause; for if any matter or fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties

parties thereby, but usually directs the matter to be tried by a jury, especially such important facts as the validity of a will, or whether A is the heir at law of B, or the existence of a *modus decimandi*, or real and immemorial composition for tithes: but as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of King's Bench, or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of 5l. with the defendant, that A was heir at law to B, and then avers that he is so, and brings his action for the 5l.; the defendant allows the wager, but avers that A is not the heir to B, and therefore upon that issue is joined, which is directed out of Chancery to be tried; and then the verdict of the jurors at law determines the facts in the court of equity.

3 Black.
Com. 452.

And note, These feigned issues are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expence in the decision of a cause. Ibid.

So likewise if a question of mere law arises in the course of a cause, as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise; it is the practice of this court to refer it to the opinion of judges of the court of King's Bench, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued

3 Black.
Com. 452.

argued by counsel on both sides, and certify their opinion to the Chancellor; and upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees: frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decree on the first hearing referred to a Master in Chancery to examine, and then he is to report the fact, as it appears to him, to the court: the report may be excepted to, disproved, or over-ruled; or otherwise is confirmed and made absolute by order of court: when all issues are tried and settled, and all references to the Master ended, the cause is again brought to hearing upon the matters of equity reserved, and then a *final* decree is made.

Ibid.

It will be convenient to pursue the further consideration of decrees under the several distinct heads following; to which they may with propriety be said to bear a separate reference, *viz.* decrees *nisi*—the operation and effect of a decree with respect to proceedings and judgment at law—the persons who are bound by a decree—the persons who are not bound by a decree—rehearings and appeals, and therein of the *caveat*, to prevent the signing and enrolling of a decree—signing and enrolling decrees—the execution of decrees—executing decrees—reviving decrees—and reviewing and reversing decrees.

And first,

This decree being drawn up, and entered with the register, the plaintiff has one day to appear against the decree, to show cause why it should not be reversed, or why it should be confirmed. If the decree is confirmed, the plaintiff has one day to appear against the decree, to show cause why it should not be reversed, or why it should be confirmed.

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Of the Decree Nisi.

IT has been already observed, that when a cause is put in the paper of causes for hearing, the same is called in its rotation, and the bill is opened by the junior counsel for the plaintiff: when the bill has been opened, if the defendant does not appear by his counsel to open his answer, the court calls upon the plaintiff to prove the service of the *subpœna* to hear judgment, and an affidavit, which must be filed, being read of the service of that process, and it appearing to the court that the defendant is regularly served to hear judgment, the plaintiff's counsel prays to have the defendant's answer read, which is accordingly done by one of the six clerks attending in court, no more of the answer being read than the *formal* words which precede every answer: but the plaintiff's solicitor must take care to have the answer signed by the six clerk, otherwise the same cannot be read.

The plaintiff's counsel pray what decree they are of opinion will be most advantageous to their client, and the court accordingly pronounces the same, superadding thereto a provisional cause, "That such decree is to be binding upon the defendant, unless being served with process, he shall within a limited time shew cause to the contrary;" and this decree, being *sub modo* only, is emphatically called a decree *nisi*, or unless cause. Gilb. Chan. 156.

This decree being drawn up, passed, and entered with the register, the plaintiff sues out a *subpœna* against the defendant to shew cause against the decree; and the service of this writ

is similar to the service of all other *subpenas*, personally by giving the label, shewing the writ under seal at the same time, if two defendants or more, leaving the body of the writ under seal at the dwelling-house or place of residence of the defendant last served, with one of the family; and the latter seems the proper service, if there is only one defendant: but this writ to shew cause against a decree being a judicial process, it must and always is made returnable in term time, and at a day certain; for if it should be made returnable out of term, or at any of the seals, it is liable to be set aside for irregularity.

3 Atk. 567.
Gilb. Chan.
#55.

This *subpena* being regularly served, an affidavit of service thereof should be made and filed, and an office copy taken to be read in court: the solicitor then instructs counsel to move to make the decree absolute; but previous thereto, in the morning of the day for shewing cause, and on which the motion is to be made to make the decree absolute, the solicitor applies to the register for his certificate, who thereupon certifies in writing, (indorsed upon the decree), "There is not any order entered with the register, whereby cause is shewn to the contrary thereof to the 29th of January," (*the day on which the motion is made:*) upon the affidavit of service of the *subpena* and this certificate, the motion is made of course to make the decree absolute, which is ordered accordingly.

Ibid. 156.

There seems to be no prefixt time for the service of this *subpena*, nor how many days notice the defendant is to have between the day of service and the day to shew cause: it should seem by the course of the court, the defendant

Ibid. 155.

is to have eight days exclusive of the day of service to shew cause; either by serving the writ eight days before the return day, or by serving the *subpæna*, so that the defendant may have eight days from the day of service; and as the motion for making the decree absolute can only be in term time, or on a seal day, the service of the *subpæna* should be adapted thereto, and therefore it should seem that the return day, (if the *subpæna* be previously served eight days,) or the eighth day exclusive of the day of service, is the regular day to move to make the decree absolute, and attention should be had, that the register's certificate should be dated that day. The order for making the decree absolute, being drawn up, passed and entered at the register office, and served upon the adverse clerk in court, the matters directed by the decree to be inquired into, or carried into execution, are to be proceeded upon as in ordinary cases.

Hinde's
Pract. in
Chan. 437.

If a defendant means to shew cause against a decree on default, being made absolute; as soon as he is served with the *subpæna* to shew cause, an application should be made by petition to the Lord Chancellor, or Master of the Rolls, before whom the cause was set down, stating the default of the defendant, and praying that, upon payment of the costs of the petitioner's default in not attending the hearing, the cause may be restored to the paper of causes, and set down to be heard next after the causes already appointed to be heard, which will be ordered of course.

The petition answered, being left at the register office, and the order thereon passed and entered at the same office, and a copy thereof served upon

upon the adverse clerk in court personally, or left with his agent at his seat in the Six Clerks office, shewing at the time of service the original order passed and entered; a bill of costs pursuant to the order should be demanded at the same time, and if upon taxation thereof, the clerks in court on each side differ, the decree must be taken to the Master's office, to whom the cause is referred, and the bill of costs left there, taking out a warrant on leaving the same, and at the return thereof another warrant to proceed thereon; and if the adverse party do not attend, a third warrant to proceed upon the bill of costs: and if no attendance is given by the adverse party, the Master proceeds *ex parte*, but before that be done, the person serving the warrant must make oath of the due service of each warrant upon the adverse clerk in like manner as the order to set down the cause is served.

The costs pursuant to the taxation being paid or tendered to the adverse clerk in court, and a certificate or receipt from him, that the same are paid, or an affidavit made and filed of a tender or refusal thereof; the defendant applies to the register, with the order for restoring the cause, accompanied with a certificate or receipt of the taxed costs being paid, or an affidavit as before mentioned, and the register sets down the cause to be heard next after the causes then appointed to be heard. The register will not set down the cause without seeing the receipt or affidavit of the tender, and refusal of the costs; and unless the cause be set down, it seems, the register will at the instance of the plaintiff certify there is no order whereby cause is shewn to
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the contrary of the decree, the order being considered of itself to be no stay of proceedings.

In a cause where there was a decree *nisi* against two defendants, who made default, the plaintiffs being three assignees under a commission of bankruptcy; after the decree new assignees were chosen, who brought a supplemental bill in the nature of a bill of revivor, and at the hearing the same defendants made default again:

And the question was, whether the plaintiffs, the new assignees, could have any other decree; but that the defendants making default might shew cause why the order should not be made absolute for carrying the former decree into execution, which decree was only *unless cause*.

Lord Chancellor; This occasions great delay and expences; but the question is, whether the plaintiffs in the supplemental bill have prayed any more than that the defendants making default should shew cause. They should have prayed, that the defendants at the same time might shew cause why the former decree should not be made absolute. And upon further consideration the Chancellor made this order, " Let the former decree be revived, and let the plaintiffs in the present causes stand in the place of the former to all intents and purposes, and be at liberty to serve the defendants with a *subpoena* to shew cause against the former decree."

Brown and
others v.
Martin and
Heathcote,
3 Atk. 218.

If any one of the defendants appears to be an infant, and any thing is prayed against him, he must in all cases have a day given him to shew cause. The words of a decree, so far as the same respect the infant defendant, are thus: " And this decree is to be binding upon the said A B the infant, unless he shall, in six months after he shall attain his

age of twenty-one years, (being served with process for that purpose) shew unto this court good cause to the contrary: and this *subpoena* to shew cause must be obtained as before, directed and served upon the defendant upon his coming of age, in the usual manner; and upon affidavit and certificate, the decree may be made absolute by motion of course, in like manner as a decree by default of appearance.

But when he comes of age, and shews cause within the six months, even here it is said, that of late it hath been doubted, whether the infant shall put in a new answer or not, and make a new defence. If he is not admitted to do this, to what end was there a day given him to shew cause? And heretofore it was never doubted, but that an infant, when he came of age, might upon motion, and with leave of the court, put in a new answer, and make a new defence, if his guardian had not made a proper defence for him, or mistaken his case: and this seems grounded upon the highest reason; for taking it for granted, (which is not to be denied,) that nothing can bind an infant, unless the act to be done plainly appears to the court to be for his benefit; and then it shall, which is supported by a multitude of precedents; why then shall he not by the indulgence of the court put in a new answer, especially when it appears to the court, that the defence made during his infancy was totally wrong? If he is to be bound by his former defence, or by his former answer, to what end had he a day to shew cause? For if that defence is only to be gone upon, as the decree was just then, so it will be now; but if he is to make a new defence, or a new case, it may vary from his former, and in that case the

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decree

decree upon this new defence, may appear to be very unjust, and may be reversed.

Gillb. Chan.
160, 161.

So in the case of a feme covert, where a bill is brought against her and her husband during coverture, and where he claims merely in her right, and then dies, and the right survives to the wife: it was never in this case said, but the wife is at liberty to file a new answer, and make a new defence, and draw into question and examination the validity of the decree obtained against her during coverture, and avoid and reverse it, if there is just cause for it.

Ibid. 161.

But where the equity of redemption of a mortgage comes to a feme-covert, against whom and her husband a bill is brought to foreclose, the feme is liable to be absolutely foreclosed though during the coverture, and shall have no day given to her or her heirs, to redeem after the coverture shall be determined.

Mallack v.
Gatton,
3 P. Will.
352.

Thus where one seised in fee devised his lands to his wife for the payment of his debts, and died, leaving an infant daughter and heir: the bill was brought by the creditors for the sale of the estate, and the infant heir made a defendant, who answers by guardian, and the estate was decreed to be sold, the other defendant *Jess* being a purchaser under the decree, which as to the infant heir was only *nisi causa*.

Afterwards, and before the decree was made absolute, the infant coming of age, moved the *Master of the Rolls*, that she might be at liberty to put in a new answer, and thereby set forth her right to the premises, which (as it was alleged) was not fully done by the former answer.

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But the counsel who moved it, not being fully instructed, and his Honour thinking this motion to be somewhat special, ordered it to be moved again: accordingly, at another day the same motion being made, the *Master of the Rolls* said, that he had been attended with a case wherein his predecessor (Sir *John Trevor*) upon a petition *ex parte*, only made an order that an infant coming of age might put in a new answer; and that upon better information, he understood it to be a matter of course, and that there was no other way than this for the infant to set forth his title, which he ought to have an opportunity of doing.

Thus there was no reason why *she* should be bound by the answer of her guardian, for that would be, at the same time that the court gave *her* liberty to shew cause, to tie up *her* hands from shewing cause.

1 P. Will.
504.
Fountain v.
Caine and
Jeffs.

So also where a plaintiff, an infant, exhibited his petition, for leave to bring a new bill, shewing that his cause had been mismanaged by his former solicitor, and making out the same by affidavits, the court gave him leave to bring a new bill; the defendant appealing from this order to the House of Lords, she was let into the possession of the premises in dispute; but they gave leave to the plaintiff to shew cause, within six months after he came of age.

2 P. Will.
401. Sir
John Napier
v. Lady Es-
ingham.

In a subsequent case, where it was objected, that an infant came too early to object to a decree, but ought to stay till he came of age, Lord Chancellor *Hardwicke* was of opinion, that an infant is proper in applying to put in a better answer, where there was a foundation for the application; as where he might not be able to come at the same evidence when he came

came of age, and the fact he wanted to examine to was of long standing, and the witnesses consequently very old, and might die before he attained his age of twenty-one.

Note, The consequence of an infant's putting in a new answer is, that he may examine witnesses anew to prove his defence, which may be different from what it was before.

Bennet v.
Lee, 2 Atk.
529.

2 P. Will.
401.

But it has been held, that in case of a decree of foreclosure against an infant, though such infant shall have six months time after he comes of age to shew cause against the decree, yet he is not, when he comes of age, to ravel into the account; nor is he so much as entitled to redeem the mortgage, by paying what is reported due, but is only entitled to shew an error in the decree. Both these points were clearly laid down by the Lord Chancellor, as agreeable to the constant practice.

Mallack v.
Gatton,
3 P. Will.
352.

So in the case of *Lyne v. Willis*, heard at the Rolls 13th May 1730, this was admitted by the counsel on both sides, and also by the court, to be the settled practice.

An infant, unless there is new matter, or fraud, or collusion, is bound by a decree made for his benefit; and with respect to personal estates, except for these causes, the parol never demurs.

Where there is a decree for the benefit of an infant, and he dies, his executor, though it may be for his own advantage to do so, shall never dispute the decree.

1 Atk. 631.

It has been held, that where an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he

1 P. Will.
737.
Galley v.
Baker,
Ca. Temp.
Talb. 201.

bound to proceed by way of rehearing or bill of review, but may impeach the former decree by an original bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause; and in case of an erroneous decree against an infant, Mr. *Vernon* used always to advise the bringing of an original bill to set it aside; but in such bill, to allege specially the errors in the former decree.

Ibid. 735.
Richmond
and wife v.
Tayleur.

2 P. Will.
74.
Lloyd v.
Mansell.

But on a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the court will not set it aside: however, on suggestion of a gross fraud, the court will, upon an original, both over-rule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied.

Sel. Caf. in
Chan. 6. 50.

Where the plaintiff had a decree *nisi*, and did not appear, his Honour looked upon it as giving up of the judgment, and dismissed the bill with costs.

Of the Operation and Effect of a Decree with respect to Proceedings and Judgment at Law.

A MAN made his will, and died indebted to several persons by bond, more than his personal estate would pay; a bond-creditor of the testator's brought a bill against the executor, to have a discovery and account of the personal estate, and a satisfaction of his debt; at the hearing, the executor made default, so there was a decree against him for an account and satisfaction out of the assets *nisi*, &c.: before the decree was made absolute, another bond-

bond-creditor of the testator brought an action of debt at law against the executor upon a bond; he appeared, and because he could not plead this decree at law, suffered judgment to go against him by default; and the account being carried on before the Master, the question before him was, whether he should allow this judgment on the account? and he being in doubt, reported the matter specially to the court for their direction.

The Master of the Rolls was of opinion, that the decree must be preferred; and it coming now to be reheard before my Lord Chancellor, he was of the same opinion.

Prec. in
Chan. 79.
Joseph v.
Mott.

An executor pays bond debts, before money, on a decree against his testator. *Per Curiam*, Clearly he shall not be allowed those payments on his account, because the decree here is equal to a judgment at law.

But in the case of *Dunston v. the Earl of Oxford*, where A and B were both creditors by specialty of I S, who died and left an executor, against whom A brought a bill in equity for a discovery of assets, and to be paid his debt; and pending such suit, the executor voluntarily, and without suit, paid B's debt: upon an account decreed on A's bill against the executor, the latter craved an allowance of this payment; and it was decreed by the Lord Keeper *Wright*, that the executor should not have an allowance thereof; seeing, that before payment was made, a bill in equity was brought by A, of which the executor had notice; and a bill in equity is equivalent to an action at law, pending which action an executor cannot make a voluntary payment of any debt. From this decree, an appeal was afterwards brought

3 P. Will.
401. note
(T.) For the
case of Dar-
fion v. Lord
Oxford, vid.
Prec. in
Chan. 188.
3 P. Will.
295, 296.

in the House of Lords, where the decree was reversed; and the reason on which the Lords principally grounded this decree of reversal was, for that as the debts were of equal degree, and since a decree of the court of Chancery cannot be pleaded at law to an action brought against an executor upon another debt of equal nature, therefore such executor might justify the payment of another debt of equal nature, even pending a bill of equity.

This point does not appear to have been settled till some time after: but it is, however, now become the established doctrine, that a decree of the court of Chancery is equal to a judgment in a court of law; and where an executrix of A, who was greatly indebted to divers persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters), and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of Chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgment, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings at law against her stayed by injunction*.

In a subsequent case of *Smith and Styles*, where a bill was brought against *Styles*, and at

* *Morrice v. the Bank of England*. Decreed first at the Rolls, by Sir Joseph Jekyll, in August 1735, which was affirmed by Lord Talbot in November 1736, and his Lordship's decree affirmed in Parliament in May 1737. 3 P. Will. 401. Note (T.) Ca. Temp. Talb. 217, and 4 Bro. P. C. 287.

the hearing there was a decree, whereby it is referred to the Master to see what was due to the plaintiff. Soon after the defendant died, and by his will appointed H P his executor, who (before the Master had made his report of what was due to the plaintiff) confessed judgment to his father for 6000l. The Master afterwards reported 2000l. to be due to the plaintiff under the decree.

The point was, which should have the priority, the decree, or judgment at law.

Lord Chancellor: This point was settled in *Morrice and the Bank of England*, where it was settled, that the *final* decrees of this court are equal to final judgments at law, and which is first obtained, ought to be first paid.

But it is certain, that if a decree is only *quod computet*, it cannot be put upon an equal footing with a judgment confessed by an executor, and before a *final* decree the executor may certainly confess judgment; for the decree *quod computet* does not vary the demand, notwithstanding the words are inserted in the decree, "*That each party do pay*;" for these words are only a direction to the Master, to insert what shall appear to be due upon the balance to either party; and when the order is made absolute, the money is to be paid to the person reported to be intitled. These decrees have been truly compared to *interlocutory* judgments at law.

Suppose a man dies indebted by bond, and is likewise indebted by covenant, and an action is brought upon the covenant, and an interlocutory judgment is *quod recuperet*, &c. and before the writ of inquiry of damages is executed, and *final* judgment entered up, the
testator

testator dies, and the executor confesses a judgment to the bond-creditor, he may plead it in bar to a *scire facias* upon the action of covenant.

So in equity upon a decree *quod computet*, it does not pass into *in rem judicatam*, till the final decree. It was said in the House of Lords, in the case of *Morrice v. the Bank of England*, that in a decree *quod computet*, it is impossible to pronounce who will be the debtor or creditor; and no stress is to be laid upon the words in the decree, "*That each party do pay.*" The judgment-creditor in this case must have the preference.

Actions at law were brought by several bond-creditors against an heir at law, who was also devisee: a bill in this court was also brought against the heir at law by other bond-creditors, on behalf of themselves and the other creditors, to have satisfaction out of the real and personal assets: a decree was obtained by them; an account of the debts directed, and a sale of the real assets descended, in order to a satisfaction of their demands.

The heir at law brought a bill to have an injunction to restrain the bond-creditors, *who had sued at law*; for that after a decree for a sale, there was no instance of creditors being allowed to proceed at law to affect that estate, when the fund itself, by which satisfaction was to be made to the creditors, was taken from the heir at law, who was brought before the court in respect of his title only, not his person.

On the other side it was said, that the sense of the court always was, that it was out of its power to take away any remedy from a creditor,

ditor, to prevent the mischievous consequences of one creditor's chalking out a method by which the rest must proceed; for then it would be easy for the heir at law to single out one creditor, and get him to bring a bill against him for that effect.

Lord Chancellor: In an action at law against executor or administrator by several creditors, he may confess judgment to which he pleases, though to one who brought his action subsequent to the rest, and he may plead that judgment against the others. Thus where one creditor sues at law, and another by bill in equity, the executor has there no remedy, though a decree is obtained here, for he cannot plead that decree at law, because the courts of law do not allow of it: so that though the decree is obtained here first, yet the creditor at law may proceed against him, and take the assets out of his hands; and the executor has no other remedy than to bring a bill in this court, setting forth that decree, and praying an injunction against that other creditor, to support the decree of this court, and to prevent a double charge.

During the course of these two causes, the executor cannot bring a bill for an injunction, as the court cannot tell which will obtain judgment; for if the creditor suing at law does, he must first be satisfied, as he will then gain a preference in course of administration, both at law and in equity; but if the decree is first obtained, the court will then restrain: and this was the ground of the case of *Morrice v. Bank of England*; for had not the executor who sued in this court obtained a decree first, and the *quantum* of the demand thereby ascertained, the

the court would not have interposed by injunction against the other creditors as it did ; which was affirmed by the Lords, an injunction being the only method by which the court can establish its decrees.

So if several creditors proceed in this court for satisfaction by *different* bills, the court will not stop the suit of *one*, because of the pendency and priority which may be gained, altho' this creates an entanglement and difficulty upon the estate : accordingly, in such a case of *five different bills* against an executor, who was ready to administer the assets, and applied to the court to have them all heard together ; for that purpose, Sir *Joseph Jekyll*, who was willing to attain that equality, postponed the causes ; which order, upon motion to Lord *King*, was discharged ; for that before a *decree obtained*, the proceedings in law or equity could not be stopped, or the chance prevented of gaining a priority in point of payment in the administration of assets ; but he did not doubt the granting an injunction, if a decree was obtained ; because the executor could not plead it at law, which he can in this court.

Then how stands it as to the heir at law, who is also devisee in the will ? But that makes no difference ; for a devise to an heir at law is considered as land descended in this court, and does not want the aid of the *statute of frauds*. It is said, that during the course of the cause the heir at law applied for an injunction, which was dissolved : and therefore it would be inconsistent in the court to grant it now. But there is no inconsistency, upon the principle of comparing it to the case of an executor or administrator ; because it was during the course
of

of the causes, where there was no ground to grant an injunction, as the judgment at law might be obtained before the decree in this court, and thereby gain a preference: but now the court is to support its own jurisdiction, and give the benefit of the decree, which is obtained, to the creditors entitled to it, and consequently by injunction or order restrain the others from proceeding at law: and an injunction was accordingly granted.

1 Ves. 212,
213, 214.
Martin and
Martin.

Another instance may be mentioned where in this court will relieve an heir, notwithstanding a bond-creditor had a clear remedy at law: the *statute* has changed the law, not only with regard to lands devised, but lands descended: in an action by a bond-creditor before the statute, if there was an alienation before the *teste* of the original writ, *riens per descent* at the time of the writ purchased was a defence, and then no ground at law to charge with the value; which is altered by the statute. If then this court has decreed a sale, in which the heir has joined, and another bond-creditor brings an action at law to have satisfaction out of the lands, upon his pleading *riens per descent*, according to that alteration, he will be charged with the sum of money for which the estate sold, he having joined in the conveyance: nor would the common-law court take notice that the sale was directed by a decree of this court; but upon a bill by the heir at law, he would have an injunction: otherwise it would be a great hardship for him; for after recovery against him for the value of the lands descended, he must take his chance, whether the lands decreed to be sold would sell for so much as he is decreed to pay.

1 Ves. 214,
215.

But

But the chief consideration is, the impossibility to have satisfaction, unless the court supports its decrees; the principle of which is, that the court does not take away the priority of a creditor, but only supports its rule, "*That a decree of this court is equal to a judgment at law:*" and then a preference will be given in priority of time only, as in judgment in the courts of law.

1 Vel. 215.

Douglas and Clay, before Lord Camden, 21st February 1767. 1 Brown's Chan. Rep. 183.

So in a late case it was held, that a decree at the suit of creditors against an executor, for an account of the personal estate of the testator, will bind other creditors; and if they sue at law, the court will award an injunction: also where there was a decree for payment of debts at the suit of trustees, and though the parties had *not proceeded* under that decree, a creditor was restrained by injunction from proceeding at law against the executor.

In this last case a difference was endeavoured to be taken between *that*, and those of *Martin and Martin*, and *Douglas and Clay*, that the bills in those cases was filed by *creditors*, where the decree was in the nature of a judgment in their favour; but in this case the bill was filed by *trustees*: that in the case where a bill was filed by a *creditor*, those who come in contribute to the suit; that *here* there was no order for creditors to come in, and that they could not make themselves parties, but must wait till the other parties choose to carry the decree into execution; then must abide by the decree, however erroneous, as they could not re-hear the cause; and if any party should die, they could not revive the suit, but must bring a new bill to have the benefit of the decree; and as this was the first instance of an application

cation

cation to restrain the proceeding at law, upon the ground of a decree upon which *no creditor* was a party, it ought not to prevail.

But the Lord Chancellor thought there was no difference, for the creditors *here* may come in before the Master; and the reason why the injunction is granted is this, that this court, having taken the fund into its own hands, will not permit the executor to proceed at law.

Where it is said, that a decree in equity is equal to a judgment, and must be paid according to their priority; this must be intended of a *personal* estate; a decree for a debt does not bind the real estate, acting only *in personam*, not *in rem*: and the remedy upon a decree to affect the land is only for a contempt by sequestration; and that that is but a personal process, appears clearly from its falling and abating at the death of the party: on the other hand, an extent upon a judgment does not so abate: judgments did not affect the lands until the statute of *Westminster 2.* which can hardly be thought to have included *decrees*; it ^{13 Edw. 2. c. 18.} plainly does not, for if so, a decree would affect but half the land, as a judgment does; whereas, upon a sequestration, the plaintiff takes the whole profits; that if a decree for a debt should be obtained, the defendant dies, leaving no personal estate, but a large real estate in fee, the latter would not be affected by the decree in the hands of the heir, as it would in the case of a judgment.

Per Sir Joseph Jekyll,

2 P. Will. 622. Vide also 1 Ves. 496. also 3 Atk. 594. Hawkins v. Crook; where it is said, that although a sequestration on mesne process be determined by the death of the party, yet it is otherwise where it issues for the non-performance of a decree.

What

*What Persons are bound by the Decree.*Pract. Reg.
125.

ALL original parties to the suit, or those that are made parties thereto, or to the decree, of full age, *compos mentis*, &c. and such as claim under them, *pendente lite*, are regularly bound by the decree.

Toth. 45.

Ibid.

Where one comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance, or privy of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court were made acquainted with the conveyance, the court is to give order upon the special matter according to justice and equity.

Toth. 10.

A decree binds (or rather alters) not the (legal) interest; but it binds the *person*, who may by the decree be ordered to convey and assure the interest; and if he refuses to obey the decree, the court will imprison him till he conform; and it so far affects the right and title to lands and goods, that the court, by sequestration and injunction, doth dispose of the possession to whom it judges the right in conscience to belong.

A decree will sometimes bind persons not parties or privies, as where four are named to defend for a parish, the decree will bind the inhabitants; so, in cases of inclosures of common, suits to settle the customs of a manor; and a decree will bind some tenants who are not parties, and others who oppose it; otherwise such suits would be endless: if, where there are such numbers, all must be parties,
there

there would be perpetual abatements, and no right could be done.

1 Chan. Caf.
48. 272.
2 Vern. 183,
184.
Caf. in Eq.
Abr. 163.

A purchase *pendente lite*, though without actual notice, and for a valuable consideration, yet shall be set aside; and though in this case the rule of equity be hard, it is in imitation of the common law, where in a real action, if the defendant aliens pending the writ, the judgment will over-reach the alienation; but as it is hard enough in some cases to make people take notice of a decree, it is harder still to oblige them to take notice of a pendency of a suit; and in a case of a real purchase *pendente lite*, the plaintiff is to be held to *strict* proof; and if any flaw at the hearing be on the plaintiff's side, the court will not let him amend; but if the purchase *pendente lite* be fraudulent, and to elude the justice of the court, it ought to be highly discountenanced.

2 P. Will.
483.
2 Eq. Caf.
Abr. 680.
p. 7.

Where a person attends a cause to which he is a defendant, and had notice of the decree by being present when it was pronounced, if he does any act in contravention to it, he is guilty of a contempt, and liable to be committed to the Fleet.

3 Atk. 365.

A decree is not an *implied notice* to a purchaser after the cause is ended, but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, *it is supposed* all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation, and then in contest; but where it is only a decree to account, and not such a one as puts a conclusion to the matters in question, *that* is still such a suit as does affect people with notice of what

3 Atk. 394.

is doing: and no cause has gone so far, and it would be very inconvenient, if where money is secured upon an estate, and there is a question depending in this court upon the right of or about that money, *but no question relating to the estate upon which it is secured, but is wholly a collateral matter, that a purchase of the estate pending that suit should be affected with notice by such implication as the law creates by the pendency of a suit.*

3 Atk. 392.

Chan. Caf.
220.1 Vern. 57.
123.

A decree for a foreclosure of a redemption against tenant in tail binds his issue, and also the remainder-man, who claims by a voluntary settlement of the tenant in tail, although no party to the decree.

If the lord of a manor is decreed to admit copyholders upon a fine certain, a copyholder, not a party, shall take advantage of the decree.

Lands were settled on trustees for raising portions for daughters; on a bill for a sale, the court decreed the heir to join in the sale, although he had no legal interest.

2 Vern. 99.

What Persons are not bound by a Decree.

A DECREE against a lord of a manor will not bind copyholders in fee, or freeholders for life, who were no parties to the suit; nor any one who has an interest therein, and is not a party or privy thereto; neither shall it bind a remainder-man who is no party.

If one defendant is in contempt to a sequestration, and a decree is made against other defendants; *that does not bind the defendant in contempt, but he may afterwards appear and answer, and have the cause heard.*

1 Vern. 224.

One defendant pleaded outlawry in the plaintiff; another defendant answered, and a decree passed against him: afterwards the defendant who pleaded the outlawry brings an original bill to set aside this decree, and it was done, he having a title paramount to the former plaintiffs. 1 Chan. Caf.
3.
Pract. Reg.
125.

If a decree was made in favour of a *feme*, to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries; the husband may assign it without any consideration, for it is in nature of an extent*.

A purchaser *bonâ fide* before the bill exhibited, not being a party by the bill, nor by order, shall not be bound by the decree, nor any one who does not appear *gratis*, nor was served with *subpœna* to hear judgment. Pract. Reg.
135.

Of Rehearings; and herein of the Caveat to prevent the signing and inrolling of Decrees.

IF by the decree either party thinks himself aggrieved, he may petition the Lord Chancellor for a *rehearing*, whether the cause was heard before his Lordship, or any of the Judges sitting for him, or before the Master of the Rolls: for whoever may have heard the cause, it is the Chancellor's decree, and must be signed by him before it is inrolled, which is done of course, unless a rehearing be desired. Vid. stat.
3 Geo. 2.
c. 30.

* 1 P. Williams, 200, 201. Note, Suppose a judgment be given to A in trust for a *feme* sole, who married; and the cognizee of the judgment, and the wife thereupon, by the consent of such trustee, is in possession of the land extended; the husband in this case may alone assign this extended interest, as he might the trust of a term to which his wife is entitled. Vid. 1 Vern. 7. 2 Vern. 27. Prec. in Chan. 419.

The Practice of the

Gilb. Rep.
151, 152.

Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard: and upon the rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the Chancellor himself, who now only sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of the evidence or arguments on either side may be supplied.

1 P. Will.
609.
Burnet v.
Theobald.

If either party then intends to rehear the cause, the first step to be taken is, to enter a *caveat* with the secretary of decrees and injunctions; and when the decree comes to be enrolled, the secretary must summons the party upon his *caveat*, and give him notice of the decree being come to his hands, for the purpose of its being enrolled by the Lord Chancellor; and if after a decree, a *caveat* be entered to stay the signing and enrolling, it stays the signing twenty-eight days, (being a lunar month,) not only after pronouncing the decree, but twenty-eight days from presenting it to the Lord Chancellor to be inrolled, and notice given by his Lordship's secretary to the clerk of the adverse party: the *caveat* is entered with the Lord Chancellor, or his Honour's secretary of decrees, by leaving a note, in the following form, with the bag-bearer of the Six Clerks office.

“ In

“ In Chancery.

“ Between *Alexander Murray*, plaintiff,
William Guest, defendant.

“ Decree made by his Honour, dated
the 31st day of *January 1789*.

“ Enter a *caveat* against inrolling
this decree.

Radcliffe, clerk.
28th *September 1789*.”

A motion was made to vacate the signing and inrolling a decree: no *caveat* to prevent the inrolment had been entered with the secretary for decrees and injunctions at the proper office, the party by mistake having applied at a wrong place to enter the *caveat*; and when he afterwards went to the secretary for that purpose, it was not till after it had been tendered to his Lordship to be signed.

Per Curiam: The court seeing the inconvenience of the quick signing of decrees, is the reason of giving liberty to the party to enter a *caveat*, without giving any reason for it, which will prevent the inrolment for a month; and therefore, though the inrolment in the present case is *strictly* regular, yet being so *quick*, it is within the reason of the common-law courts setting aside judgments every day, as on surprise, although they are strictly regular: so may this court vacate the inrolment of a decree, especially when it partly arises on the defendant's mistake: and upon these grounds the inrolment in the principal case was vacated.

The party petitioning for a rehearing must deposit 10 l. with the register, 9 l. 10 s. whereof is generally returned him, if he prevails in

the rehearing, though the court sometimes orders it to be divided; and as to the remaining 10s. it is the register's poundage, he having 12d. in the pound for all money deposited with him, on his repaying the same: and on a rehearing being ordered, the cause is commonly set down for a certain day, on which it is to be reheard; and two days at least before such day, the petitioner is to leave for the Chancellor, (or the Master of the Rolls, if the application for a rehearing was made to his Honour,) a true copy of the decretal order appealed from, and also of the petition for a rehearing; on leaving which with his *Lordship's* or *Honour's* *secretary*, the party pays 5s.

The granting a rehearing shall not any way stop or hinder any proceedings on the order or decree appealed from, without the special order of the court; but that the party in possession of the order or decree shall be at liberty to proceed therein, as if no rehearing was granted.

When a plaintiff in a bill of revivor omitted to pray process against one of the defendants, yet several motions being afterwards made in his name in the suit, and a commission executed in his name, and then a decretal order passed, this omission was held to be no cause for a rehearing, the defendants having made this person a party by the proceedings, and all having submitted to it, his name must be used as a defendant to the end of the cause.

As it is in the discretion of the court whether they will grant a rehearing or not, it is equally so whether they will do any thing thereon: and in the case of Mr. *Onslow*, Speaker of the House of Commons, the court, on the circumstances of the case, and the decree

not

Cl. Tut. 38.
Ord. Chan.
208.

1 Chan. Rep.
252.

3 P. Will.
8.

not being inrolled, refused to discharge an order for a rehearing, though at the distance of about twenty-four years *: so where an agreement was signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring an appeal, yet the cause was allowed to be reheard.

* 3 P. Will.
8. note (D.)
by Lord
King, the
last seal after
Trinity
term 1732.
3 P. Will.
243.
Buck v.
Fawcett.

It has been held, that on the plaintiff's petition to rehear, the cause is open with respect to him as to those parts only complained of in the petition; whereas the defendant is at liberty to object against every part of it: so in a case where one question was, whether on an appeal to the Chancellor from the *Rolls*, the party might be admitted to read to any thing to which he had not before proved on the first hearing? and the Lord Chancellor was of opinion he might; for that, as he said, it was to be inrolled as his decree, and the appeal was only to give him an opportunity of hearing what could be offered why he should not inrol it as his decree; and therefore the cause was entirely open, and the party at liberty to offer what he could against his signing and inrolling the decree †; and in another case it was ruled, that on an appeal the whole case is open; but on rehearing only so much as is petitioned against.

1 P. Will.
300.

† Prec. in
Chan. 496.
But vid. *ibid.*
antea, 295.
where a
contrary
doctrine is
held; vid.
also 1 Vern.
443.
Gilb. Eq.
Rep. 151.
2 Ver. 464.
Howard v.
Colley,
Trin. 11
Geo. 1.

In a subsequent case, however, it has been said, that on an appeal from the *Rolls*, the party appealing may be let into *new* evidence which was not read there, provided he will give up his deposit.

2 Atk. 408.

If a matter of fact be mistaken at the hearing, it is to be set right by rehearing, and not otherwise; but if it be a small mistake, it is sometimes rectified by petition to the Lord Chancellor, or Master of the *Rolls*, who heard

1 Chan. Cas.

The Practice of the

the cause; praying that all parties, with the register, may attend with the minutes, and that his Lordship or Honour would rectify the same; on which an attendance is ordered, and the court, if they see cause, make an order for rectifying the minutes.

If, *after* hearing, a witness is convicted of perjury, advantage may be taken of it on a rehearing.

²Vern. 463.

Decree *nisi*, the defendant not appearing, and made absolute; two years afterwards the defendant petitioned to have the cause reheard, on the usual terms required in the case of a rehearing; and ordered accordingly.

Vid. Ambler.
Repe 89.

Of signing and inrolling Decrees.

UNTIL the decretal order is drawn up, signed, and inrolled, it has the force only of an interlocutory order, and is not final, but may be altered upon a rehearing, or sometimes upon motion; but it cannot be crossed, altered, or explained, upon a bare petition only, though it may be thereby stayed a while, till it can be moved in court.

Pract. Reg.
123.

1 Chan. Caf.
45.

Pract. Reg.
123.

1 Px. Alm.
20.

1 Px. Alm.
26.
Ord. Chan.
56. 14.

No decree or dismissal shall be presented to the Lord Chancellor or Master of the Rolls to be signed, till it be signed by the six clerk in the cause, or his deputy; and if a decree, dismissal, or injunction, be made or granted by any of the judges sitting in Chancery, it must be signed by them, or such of them as shall make or grant the same, and afterwards by the Lord Chancellor.

All decrees or dismissions pronounced upon hearing the cause in this court, are to be drawn up, signed and inrolled, before the first day of the next *Michaelmas* or *Easter* term after the same

same shall be so pronounced respectively, and not at any time after, without special leave of the court; but if the decree is not inrolled within the time prescribed by the rules and orders of the court, an application must be made by motion to inroll the decree *nunc pro tunc*, which the court will order as of course.

Ord. Chan.
142.
Pract. Reg.
124.

The clerk in court draws up the form of the decree for inrolment, reciting therein all the pleadings, orders, and material proceedings in the cause; and for this purpose the solicitor leaves all the necessary proceedings requiring inrolment with his clerks in court: and the several proceedings in the suit being put into proper order, form, and language, are to be engrossed upon treble sixpenny stamped brief paper: this is called the *docket*.

The Form observed in drawing a Decree.

“ Lord Chancellor.

Friday the 9th day of
March 1789, and in
the 29th year of the
reign of his Majesty
King George the
Third. Between A
B, plaintiff, C D,
defendant.

“ This cause coming yesterday, as also on this present day, to be heard and debated before the Right Honourable the Lord High Chancellor of *Great Britain*, in the presence of counsel learned on both sides, the substance of the plaintiff's bill appeared to be [*Here recite the bill briefly.*] Therefore that the said defendant may account, &c. [*The prayer of the bill.*]

bill.] And to be relieved is the scope of the plaintiff's bill: whereto the counsel for the defendant alleged, That he by answer admits, &c. [*Here set forth the substance of the answer.*] Whereupon *, and upon debate of the matter, and hearing the will of the said E F, the answer of the defendant, a paper-writing or account of the testator's hand-writing relating to his estate, marked No. (1.) and the proofs taken in this cause read, and what was alleged by the counsel on both sides, his Lordship declared, That," &c. [*Here set forth the decree of the court.*]

But note, That if a cause be heard upon bill and answer only, and the decree be thereupon made, then you say after the words coming on to be heard and debated before, &c. you say, "upon the bill and answer in the presence of, &c. Whereupon, and upon debate of the matter, &c. [*as in the order,*] this court doth think fit, and so order and decree; and accordingly it is ordered, adjudged, and decreed, that," &c. [*Here insert the decretal part of the order on hearing.*]

And if it be a rehearing, upon the order on hearing, then after reciting the order on hearing, say thus;—"With which said order the said defendant being dissatisfied, he petitioned his Lordship for a rehearing of the said cause, and to have the order rectified in several particulars; and thereupon, by an order bearing date, &c. it was ordered, that the said cause should be reheard the, &c. of, &c. upon the defendant's depositing 10l. with the register,

* Here insert the words of the order, beginning at *Whereupon*; for where the depositions are read at the hearing, it is always said upon reading the proofs, "and also such exhibits or deeds, if any read at the hearing."

[as you find by the words of such order.] And the said defendant having deposited the said rol. accordingly, and the said cause coming on to be reheard, in the presence of counsel, &c. the counsel for the defendant insisted that, &c. [*setting forth the substance of the defendant's argument, as recited in the order of rehearing,*] whereto the counsel for the plaintiff insisted that, &c. [*Reciting what the plaintiff's counsel insisted upon, as mentioned in the said order of rehearing.*] Whereupon this court did declare and decree," &c. [*according as it is expressed in such order of rehearing.*] And if upon the rehearing, the former order be confirmed, say, — "Whereupon, and upon debate of the matter, and hearing what could be alleged by counsel on both sides, this court declared, that the decree formerly pronounced in this cause was just, and did accordingly order that the same should stand," &c. [*as it is in the order.*]

In drawing up all dismissions made upon the hearing of a cause, you use the same words of course as you do in drawing up the decrees.

But towards the bottom or end of every decree or dismissal you draw up, in the last sheet upon the left hand you write these words, viz.

"It agrees with the records, orders, and report, and is examined by

A B, for the plaintiff."

Which A B is the plaintiff's fix clerk, if drawn up for the plaintiff; but if drawn up for the defendant, then the defendant's fix clerk is to sign it: but if there be only one order, you say

The Practice of the

say only *order*; and if no *report* in the cause, you leave the same out.

The docket, authenticated by the proper officer, is left by the clerk in court with the bag-bearer of the Six Clerks office, and he leaves the same with the Lord Chancellor's secretary of decrees and injunctions, to be signed by his Lordship. If the decree be made by the Master of the Rolls, previous to the signing by the Lord Chancellor, the signature of his Honour must be procured; and for this purpose, the bag-bearer leaves the docket with his Honour's secretary, to be signed by the Master of the Rolls; which being done, the signature of the Lord Chancellor must be then obtained, which is the last and final requisite previous to the inrolment of the decree; for whether (as it has been before observed) the cause was heard before his Lordship, or any of the Judges sitting for him, or before the Master of the Rolls, it is the Chancellor's decree, and must be signed by him before it is inrolled. The docket being left by the bag-bearer with the Lord Chancellor's secretary of decrees and injunctions, is presented to his Lordship to be signed, and which (if no *caveat* is entered by the adverse party) is signed by his Lordship as of course. The day of the month and year when the docket was signed, is written at the foot of the docket, near the signature of the Lord Chancellor.

As soon as the docket is signed by the Lord Chancellor, the same is carried to the clerk of the chapel of the Rolls, who gives you as many parchment rolls as are sufficient to inrol the decree; and he usually writes upon the last sheet of the docket, the day and year, and
also

also his name, as a memorandum of his delivery of the parchment rolls: on these rolls, the clerk in court, inrolling the decree, ingrosses an exact copy thereof, and carefully examines the same with the docket, which, together with the parchment rolls, is carried by the clerk in court into the record-room of the Six Clerks office, and deposited with the record-keeper for safe custody.

By the inrolment the decree is completely perfected; nor *after* inrolment can it be reversed, but by an appeal to the House of Lords brought within five years, or by bill of review brought within twenty years from the pronouncing of the decree.

By the standing rule of the court, a decree must be inrolled before it can be pleaded in bar to a second suit brought for the same matter.

A decree being pronounced, and a defendant dying soon after, the court may be moved to have it inrolled nevertheless, for it may be compared to a judgment at law, which, if given before, may be entered up after the party's death; and this court has ordered decrees in this manner to be inrolled.

3 Atk. 809.

2 Chan. Cal.
227.
Nell. Rep.
in Chan.
169.
3 Chan.
Rep. 73.

As there is always *six months* allowed the party to inrol his decree, if he comes to inrol it after that time, he must apply by petition to the court to inrol it *nunc pro tunc*, and this is always granted; but it is conceived, such an order ought to be passed and entered with the register, the proper repository for all those orders; and though this is never done, yet a case may fall out, where it may be of fatal consequence to the party; for suppose one of the errors assigned by the bill of review should be,

that

that by the ancient rules and orders of the court, the decree is to be inrolled by such a time, and yet upon the face of the inrolment it appears to be inrolled afterwards, without any leave or order of the court for its being so; for the day of signing the decree always appears upon the face of it; and if it turns out that there is no order entered with the register to inrol the decree *nunc pro tunc*, how will such an error be got over? And therefore it were to be wished, that all those orders to sign decrees *nunc pro tunc* were entered with the register, to obviate a fatal error which one time or other may fall out.

Gilb. Chan.
189.

Of the Execution of Decrees.

THE writ of execution is a process of this court, reciting an order or decree of the court, (be the same final or interlocutory,) or the substance thereof, or of some part thereof, and requiring an obedience to so much of the order or decree as is recited, and concerns the party to perform.

Pr. H. Ch.
24.
Pract. Reg.
173.

And the party is intitled to this writ *de executione judicii*, after the decree has been passed and entered with the register, signed by the Lord Chancellor, and regularly inrolled; but he cannot have it upon the decretal order being drawn up only, except (as it is said) that in regard of his poverty, or some other sufficient cause shewn, the court may think fit so to order upon petition or motion.

West. Pr.
sect. 45.
Pract. Reg.
174.

When the execution is upon the decree for payment of money, the writ must be personally served, by delivering the party the process under

under seal, or, which is more usually done, shewing the same under seal, and delivering to him a copy; and if a party to the decree serves it not himself, (who might, by immediate authority of the decree, demand and receive the money,) the party that serves it must be furnished with, and shew to the party on whom he serves the process, a letter of attorney to receive the money; and he must *demand* the money, otherwise the non-payment of it will be no contempt: if the decree is not for money, then this process may be served by leaving the writ under seal at the party's house, or in case he has no house, at his last place of abode, if he is not to be met with himself.

Pr. H. Ch.

24. Cl. Tut. 3.

And if, upon the regular service of this writ, the party obey not the decree, then upon affidavit of the due service of this writ, and that he hath not performed the decree, being filed in the proper office, the ordinary process of contempt, *attachment*, *proclamation*, *commission of rebellion*, &c. may of course be made out against him; and if a party in contempt for not obeying a decree be taken by the serjeant at arms, he is to be committed to the Fleet, there to remain till he perform the decree, or so much thereof as is presently to be performed, and give good security by recognizance, with sureties, for the performance of what is to be done afterwards, if any thing remain to be performed, and also pay the other his costs in prosecuting the contempt: and if he continue any considerable time in custody, without paying obedience to the decree, the court will set him a day to perform the decree, which he upon notice still refusing to do, the plaintiff may, by a motion to be made for that

Praet. Reg.
175.

that purpose, cause him to be brought into court by an *babeas corpus*; and upon his still persevering in his obstinacy, the court will take such further course as shall seem fit.

T. th. 175.
6.
Com. Att.
439.
Pr. H. Ch.
25.

In case of a decree for money, if the defendant is not taken, but stands all process of contempt upon the decree, and the serjeant at arms certifies that he is not to be found, or being taken by him is rescued, a sequestration will be granted; and that as well where a decree is for the payment of a personal duty, as money upon contracts, debt, account, &c. as where it is for rent charges, &c. issuing out of the land.

3 Atk. 276.
Shelby v.
Hawkie.

If the decree is for the possession of land, and the party has been served with the writ of execution of the decree, and also with an attachment, the court usually grants an injunction to be served upon him to deliver up possession; and if this be disobeyed, after it is served, upon affidavit thereof, the court will grant a writ of assistance, directed to the sheriff of the county where the lands lie, commanding him to be aiding and assisting to put the party, in whose favour the decree was made, in possession.

Where the defendant was not to be found, and it was thereupon ordered, that service of a decretal order and writ of execution on the clerk in court should be good; held *per Curiam*, that the shewing them, and leaving a copy thereof with the clerk's agent, at his seat in the office, was sufficient; nor needs there (in such a case) a letter of attorney to receive money decreed to bring the defendant into contempt; for the clerk is not to pay the money, but to give his client notice: and though ordinarily where the decree is for payment of money

money to the party, he must be sought out and personally served, &c. otherwise the non-payment will not induce a contempt; yet in some cases, as if the writ be left with a servant, and it appears to have afterwards come to the party's hands, this will be sufficient. Praes. Reg.
178.

It is said, that if a party upon his examination touching his contempt of a decree, denies service and contempt, it must be directly proved by two witnesses. Ibid. 179.

If by the decree the defendant is to produce deeds and writings, or to attend and be examined upon interrogatories, the ancient rule used to be, to serve him with a copy of a writ of execution of the decree, and shew it him under seal, and at the same time to serve him with a warrant from the Master, to give him a reasonable time to produce them: as where a man lived in *Northumberland*, he must have a longer time than if he lived near the town; and by the ancient rule, no writ of execution was ever allowed to be made out till after the decree was signed and inrolled. Gilb. Chan.
165.

As this rule was anciently pursued, so it appears to be well grounded; because the party had fair notice to produce them, and an opportunity of shewing to the court his reason for not doing thereof; whereas now nothing is more common than to take out two warrants from the Master, which are served on the adverse party's clerk; and on his not producing the deeds, and the Master certifying the default, a motion is presently made to produce them in four days, or stand committed; and this order is served on the party's clerk: and how it is possible for a man to produce them in four days, for a man that lives above a hundred Ibid.

dred miles off, is not easily to be accounted for.

Gilb. Chan.
165.

It is therefore conceived, that upon all these motions for a man to stand committed in four days for not attending to be examined, or for not producing deeds according to the decree, the question (tho' this seems to be of course) ought to be asked, whether the party has been served with a writ of execution of the decree, and with the Master's summons served on the party personally; if he has, then on a certificate from the Master of their not being produced, or of his failure to attend and be examined, he is left inexcusable; and in that case, he ought to stand committed: and as all commitments are grounded upon some offence or other, so it has been also taken, that the offence committed is not paying duty to the great seal; and the party in this case may proceed, if he pleases, by way of attachment.

The words of course preceding a writ of execution of an order.

“ To A B, and to all and every other person and persons to whom the tenor of these presents doth in any wise relate or concern, greeting. Whereas an order hath been lately made in our court of Chancery, in the words following:

The words after.

“ — Therefore we strictly injoin and command you the said A B, and all and every the persons abovementioned, effectually to perform,

perform, fulfil and execute all and every the matters and things specified and contained in the said recited order, so far as the same do any way relate to or concern you, or either of you, according the tenor and true meaning of these presents; and hereof fail not at your peril. Witness ourself at *Westminster*, the — day of — in the — year of our reign."

N. B. The words dotted under may be left out, if the order be such as the defendant only is to perform.

If of a decree.

"To A B, greeting. Whereas a certain final judgment or decree hath been lately made in our court of Chancery, in the words following:

The words after.

"— Therefore we strictly injoin and command you the said A B, effectually to perform, fulfil, and execute all and every the matters and things specified and contained in the said final judgment or decree, so far as the same any way relates to or concerns you, according to the tenor and true meaning of these presents; and hereof fail not at your peril. Witness," &c.

Before the report.

"And whereas the said Master, in pursuance of the said order, made this report in the words following:

Short writ of execution of a decree.

"George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To A B, greeting. Whereas by a certain final judgment or decree lately made before us in our court of Chancery, in a certain cause there depending, wherein C D is complainant, and you the said A B defendant, It is ordered and decreed, that you the said defendant do pay to the said complainant the sum of ———, as by the said decree duly inrolled, and remaining as of record in our said court of Chancery, doth and may more fully appear: therefore we strictly injoin and command you the said A B, that you do immediately pay or cause to be paid unto the said complainant the said sum of ———, according to the tenor and true meaning of the said decree: and hereof you are not by any means to fail at your peril. Witness ourself at *Westminster*, the ——— day of ——— in the ——— year of our reign."

Of exemplifying Decrees.

AN exemplification is the copy or example of a matter recorded or inrolled, as decrees, letters patent, depositions, &c. and is made out from the inrolment thereof, and sealed with the great seal; and such exemplifications are as effectual to be pleaded or produced in evidence as the decrees, &c. themselves are.

And

And bills, answers, depositions, &c. being matters of record are exemplified as well as decrees: but note, that nothing but matter of record ought to be exemplified; and therefore all decrees, deeds, &c. must be enrolled before they are exemplified.

The plaintiff would have read in evidence an exemplification of part of a *patent*, which was objected to by the defendant, for that nothing but the patent itself, or an exemplification, or copy of the whole, could by law be evidence: plaintiff's counsel insisted, that by the 3 and 4 of *Edward 6.* cap. 4. and 13 *Eliz.* cap. 6. an exemplification of so much of a patent as relates to the matter in question, is to all purposes of law made of the same force, as if the whole patent were exemplified.

But the Lord Keeper was clearly of opinion, that tho' by those statutes an exemplification of part of a patent be made sufficient to make a title under, or to be pleaded in any court where the other side will have time to resort to the patent, and to be advised whether the exemplification be of all that is material, and if it be not, they may have advantage of it; yet they did not extend to authorize the giving such exemplifications in evidence, where the other side could have no time to consult the patent roll, and might be surpris'd, and lose his right by an imperfect exemplification; and cited a case wherein he had known it so held in B R. on offering such an exemplification in evidence; and therefore if the plaintiffs insisted upon it, being of great consequence, he would have the opinion of all the judges before he would admit it: whereupon the plaintiff waived it,

Prec. in
Chan. 59,
60.

and produced the patent roll itself, and so the cause went on.

An exemplification of a deed may be ordered to be pleaded at law, where the deed inrolled cannot be produced.

Toth. 89.

Proofs cannot be exemplified without bill and answer; and therefore if a bill be dismissed for irregularity, or impropriety of jurisdiction, &c. as not proper for this court, or where it was by way of revivor, when it should be by original bill, so that there never was any such cause in court, the depositions in such cases cannot be exemplified, seeing the bill could not.

1 Chan. Caf.
175.

Exemplifications of decrees are docquetted thus, *viz.*

“ In Chancery, 15 April 1740. An exemplification of the inrollment of a decree in this honourable court, in a cause wherein A B is plaintiff, and C D and others are defendants; exemplified at the request of, &c.

Examined { R H, } Masters in Chancery.”
by us { F E, }

And certified thus, *viz.*

“ We the Masters in Chancery, whose names are hereunto subscribed, have carefully examined the exemplification mentioned in the docquet on the other side, with the inrollment thereof; and do certify the same to be a true exemplification of the said inrollment.

R H.
F E.”

And

And indorsed thus, *viz.*

“ An exemplification of a decree in Chancery, in a cause there, wherein, &c. exemplified at the request of,” &c.

And in the like form, an exemplification may be of the bill, *dedimus*, answer, replication, commission to examine, interrogatories, and depositions, &c. as follows, *viz.*

“ *George, &c.* To all persons to whom Bill, these presents shall come, greeting: We have inspected a certain bill of complaint exhibited before us in our court of Chancery, remaining filed and as of record in the said court, in the words following :

“ We have also inspected our commission *Dedimus*. with the indorsement thereon, directed to certain commissioners to take the answer of the aforesaid C D and E F to the said bill, likewise remained filed in our said court, in the words following :

“ We have also inspected the answer of the *Answer*. aforesaid defendants, taken by virtue of the aforesaid commission, and returned into our said court with our said commission, remaining filed in our said court, in the words following :

“ We have moreover inspected the replica- *Replication*. tion of the aforesaid A B, to the answer of the aforesaid C D, and E F, remaining filed as of record in our said court, in the words following :

U u 4

“ We

The Practice of the

Commis-
sion,

“ We have likewise inspected our writ directed to certain commissioners to examine witnesses with the schedule of oaths thereto annexed, between the aforesaid parties, with the indorsement thereon made, remaining as of record in our said court, in the words following :

Interroga-
tories,

“ We have likewise inspected certain interrogatories on the part of the said A B complainant, against the aforesaid C D and E F defendants, exhibited before the said commissioners, remaining as of record in our said court, in the words following :

Depositions,

“ And, lastly, we have inspected the depositions of certain witnesses taken and examined before the said commissioners on the behalf of the said A B complainant, against the aforesaid C D and E F defendants, by virtue of our aforesaid commission, and returned into our said court with the commission and interrogatories aforesaid, and there remaining as of record in our said court, in the words following :

Conclusion,

“ Which said bill, and the commission to take the said answers and indorsements thereon, and also the said answers, replication, commission to examine witnesses, and indorsement thereon, with the schedule of oaths thereto annexed, interrogatories and depositions of witnesses, we have at the request of the said A B exemplified by these presents, and in testimony thereof have caused these our letters to be made patent. Witness ourself at *Westminster*,” &c.

“ George

"George the Third, &c. We have in-^{Decree.} spected the inrollment of a certain final judgment or decree lately made before us in our court of Chancery, and remaining as of record on the rolls of the said court, in the words following:

"We therefore, at the request of the said^{Conclusion.} complainant, have exemplified the said final judgment or decree by these presents, and in testimony thereof have caused these our letters to be made patent. Witness," &c.

Of reviving Decrees, &c.

BILLS of revivor of decrees, and other proceedings, are necessary where a suit happens to be discontinued, which is generally by reason of the death either of the plaintiff or defendant, before the decree inrolled.

Where a decree is inrolled, and a party dies, or a female plaintiff marries, decree and proceedings must be revived by a *subpœna scire facias*, though in case of a decree inrolled a revivor by bill hath been allowed.

¹ Chan. Cas.
37.

But where the decree is not signed and inrolled, a bill of revivor must be brought.

And it is said, where one can revive by a *subpœna sci' fa'*, it is in their election to do it either by that process, or by bill of revivor: But where after the decree there have been other proceedings, which cannot be revived by the said *subpœna*, this sure must be done by bill.

<sup>Vid 2 Chan.
Rep. 67.</sup>

If the parties that would revive the decree inrolled, be in privity of blood to the first parties, *viz.* as heirs; or in privity of contract,

as

as executors or administrators, they may revive it by *subpœna sci' fa'*.

Where the decree was obtained against the ancestor, and his heir does not claim under that title, but by virtue of another title paramount; as where an estate is decreed against a man, and his heir insists his father had not title thereto, or was only tenant for life thereof, the decree can never be carried into execution against him; he is at liberty to controvert the justice and validity of the decree, and may make a new defence from what his ancestor did, and vary his case as he shall be advised, and the parties go into new examination of the matter, and hear the cause *de novo*; and the court judges whether the decree is right or not, and may affirm or reverse it at their pleasure.

But where one man obtains a decree against another, for a real estate, and the party dies before the plaintiff is put in possession; in that case, if the heir at law claims the estate by descent under his ancestor, or as devisee under him, he shall never controvert the justness of the decree, though his ancestor should have mistaken his defence; nor shall he be at liberty to make a new defence, or enter into new proof, so as to overthrow the former decree; especially when it appears to the court that the decree has been of an ancient standing.

Owen and
Curson,
2 Vern. 237.

If an administrator obtains a decree, but dies before inrollment, the administrator *de bonis non* may revive this decree within the equity of the statute 30 Car. 2. c. 6.

This *subpœna* is obtained either on motion or petition, and must be served two days at least before the return; in all other respects the service is like that of a *subpœna* to answer.
And

And on the return of the *subpœna*, if no cause be shewn to the contrary, the decree will, upon affidavit of service, and a motion to that purpose, be ordered to stand revived.

But if there be neither privity in blood, nor privity in contract, the decree or cause must be revived by an original bill, and not by *sci' fa'*, or bill of revivor. And therefore an assignee, or a devisee, cannot have a bill of revivor, being in-nature of purchasers only.

Vid. 1 Chan.
Cas. 122.
174.

On an original bill in nature of a bill of revivor of a decree, a devisee shall have the same advantage of the decree as an heir or executor.

1 Vern. 548.

Also a bill of revivor lies not upon a decree of a long standing; but in such cases an original bill is to be exhibited, and the decree to be set forth as evidence.

1 Chan. Cas.
216.

A decree was signed and inrolled, omitting part of the matter decreed, and the defendant being dead, (so that there was no helping it by motion,) a bill of revivor was brought to revive (as was alleged) the part of the decree omitted, though in truth it extended to the whole decree. To this the defendant pleads, that the decree being inrolled, a bill lay not, but a *subpœna sci' fa'*. But the plea and demurrer were over-ruled; and it was held that a *sci' fa'* would only have revived the decree, and the proceedings before it, but not those afterwards.

1 Chan. Cas.
37.

A bill of revivor was brought where there had been some proceedings touching costs after the decree, and adjudged good.

2 Chan. Rep.
67.

No bill of revivor can be brought, where it relates to costs only, (unless the costs are taxed, and a report made in the life-time of the party,) for this is a personal action; and *actio personalis*

personalis moritur cum persona. But if by the decree the party is to pay a sum of money, or if a duty is decreed, or if he is to deliver over a bond or deed or writing, or if any thing is annexed to the decree besides costs, the suit may be revived.

² Chan. Rep.

195. 246.

¹ Chan. Caf.

7.

And yet a bill of revivor lies not to revive a decree made for costs only.

² Chanc.

Rep. 195.

And it is said, no defendant, or any other who represents him, can or ought to revive in case of an abatement happening before the decree be signed and inrolled.

² Vesf. 232,
233.

There have been cases of bills in nature of revivor, to carry on a former decree, where the court sometimes, though but seldom, have said the defendant may dispute that decree, but never that the plaintiff might.

Of reviewing and reversing Decrees.

Vid. Index,
title Bills of
Review.

THE several matters properly falling under this head having been considered at large in a preceding part of this work, it will be necessary to make in this place but few additional observations.

When a decree comes to be reversed on a bill of review, it ought to be either, because it was unjust in matter of law arising within the body of the decree, or proceedings in the cause, or for that the court wanted, or exceeded its jurisdiction.

As in the case of bills of revivor, so also in bills of review, none but such as are parties, or privies, can commonly bring them; but in some cases, where a man's interest is affected, or he is grieved by a decree, he may have this bill;

as

as where a parish was sued, and four of the parishioners named only to defend, another parishioner may bring this bill.

1 Chan. Caf,
272.

As the end of a bill of review is to reverse a decree formerly made; in order to proceed therein, first a copy of the decree, after it is signed and inrolled, is to be procured, and then reciting the former proceedings, as they are recited in the decree, you are to set forth the party's case, and assign the reasons why the decree should not be binding, but reversed as for error in law, &c. And this bill cannot regularly be brought upon any matters in fact, or matters of record than the decree itself; yet if there be oath made of the discovery of new matters, which could not possibly be had or used at the time when the decree passed, a bill of review may be exhibited by leave of the court, but not otherwise.

Vid. Totb.
42.
Gilb. 184.

The matters assigned for error must appear in the decree itself. And no errors can be assigned on a bill of review, but errors in law; which must appear from the facts stated in the decree; and if new matter be discovered afterwards, it can only be assigned for error, with the leave of the court.

1 Vern. 166,
292.

If a decree be against a statute, it may be reviewed and reversed: so if the Chancellor errs in a decree in a matter of law, and it appears within the decree, this decree may be reviewed for this error.

1 Roll. Abr,
332.

But if the Chancellor errs in his decree upon a matter of fact, this decree is final, and cannot be reviewed, because the parties cannot go to a new examination of witnesses now; for after publication this may not be done. And where the decree is final, and cannot be reviewed,

1 Roll. Abr,
382.

viewed, it is also observed, that it cannot be altered by original bill, unless for matter subsequent. And yet if the Chancellor errs in his conscience, upon a matter of fact proved before him, there may be review of this matter; because there needs no new examination, but this may be reviewed upon the old depositions, which is usual.

1 Roll. Abr.
382.
Vid. Chan.
Caf. 45.

It has been insisted on as a rule, that nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be a ground for a bill of review to reverse a decree; and that a confession subsequent to the decree is no ground for a bill of review; nor is the want of any evidence or matter which might have been used in the first cause, and of which the party had then knowledge. An account was decreed, pending which the suit abated; and yet the account was carried on, finished and confirmed by decree, and held to be no error, or cause of reversal on a bill of review brought. But *quære* if this account could be carried on, as the suit abated, without bringing a bill of revivor, and an order obtained for reviving the former proceedings.

3 Chan. Rep.
76.
1 Chan. Caf.
43. S. P.
2 Chan. Rep.
45.

1 Chan. Caf.
44, 45, 122.

If a decree, or any part of it, be in the nature of things impossible, or if it be repugnant, and one part contradictory to the other, it is erroneous, and may be reversed on a bill of review. But though there be apparent error in the decree, if the party has rested under it sixteen or twenty years, the court in some cases will not reverse it upon a bill of review. Also the court will not reverse a decree for want of form, or mistaking in an account; for that may be helped by a Master, without reviewing.

1 Chan. Caf.
86.

1 Chan. Rep.
140.

A decree

A decree (and much more an interlocutory order) gained by fraud may be set aside on a petition, (as well as a judgment at law by motion)——*a fortiori* may such decree be set aside by bill.

The plaintiff, who had a decree, brought a bill of review, and thereby complained, that he had not enough decreed him; and a demurrer being made thereto, for that if a bill of review lies, it is only for him against whom the decree is; after a long debate, the demurrer was allowed, and the bill of review dismissed. And where a former bill of review had been dismissed, the party brought another, suggesting farther errors, &c. But this was dismissed also on the maxim, *Interest reipublicæ ut sit finis litium*.

If a man brings a bill of review, to which there is a demurrer, which is allowed, he cannot afterwards bring a new bill of review.

A bill of review lies not after a bill of review.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, it cannot, so as to prevent the demurrer's being re-argued.

3 Will. Rep.
111. By
Lord Chan-
cellor *argu-
endo*.

1 Vern. 44.
1 Vern. 417.
S. P.
1 Vern. 135.
2 Chan. Cal.
133.

2 Vern. 120.

Of Appeals to Parliament.

AN appeal to parliament, that is, to the House of Lords, is the dernier resort of the subject, who thinks himself aggrieved by any interlocutory order or final determination of this court; and is effected by *petition* to the House of Peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said to have begun in 18 Jac. I.

3 Black.
Com. 454.
455.

Com. Journ.
13 March
1704.

and

and certainly the first petition which appears in the records of parliament, was preferred in that year; and the first that was tried and determined, (though the name of appeal was then a novelty,) was presented in a few months after: both levelled against the Lord Keeper *Bacon* for corruption and other misbehaviour. It was afterwards warmly controverted in the House of Commons, in the reign of *Charles* the Second.

Lords Journ.
23 March
1620.

Ibid. 3. II,
12 Dec.
1621.

Com. Journ.
19 Nov.
1675.

Show. Parl.
C. 81.

Duke's
charitable
uses.

Gilb. Rep.
155, 156.
Prec. in
Chan. 295.

But this dispute is now at rest; it being obvious to the reason of all mankind, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the Chancellor relating to the commissioners for the dissolution of chauntries, &c. under the statute 37 *Hen. 8. c. 4.* (as well as for charitable uses, under the 43 *Eliz. c. 4.*) an appeal to the king in parliament was always unquestionably allowed: it appears therefore that there are two ways by which the decrees of this court may be reversed;—the one, by bills of review, already treated of;—the other, by appeals in parliament: and though, when the decree is to be reversed by a bill of review, the matter assigned for error must appear by the decree itself; so in an appeal no *new* evidence is admitted in the House of Lords, upon any account; for this is a distinct jurisdiction, which differs very considerably from those instances, wherein the *same jurisdiction* revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly

stantly followed in the spiritual court) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below.

But note, An appeal cannot regularly be made to the House of Lords, till after a rehearing before the *Lord Chancellor*, if the cause was heard before the *Master of the Rolls*; though if a decree is made by the *Master of the Rolls*, and the same is signed and inrolled, such decree may be appealed from to the House of Lords, because there can be no rehearing thereof before the *Chancellor*.

Appeals are to be signed by two counsel of character, usually such as have been concerned in the cause below, and exhibited by way of petition, and lodged with the clerk of the House of Lords, with whom the appellant is to deposit twenty pounds to recompence the other party his costs, in case he fails in his appeal, &c.

The appeal being thus lodged, and read in the House, the respondent is ordered to have a copy of the appeal, and required to put in his answer thereto on a day fixed; and a day is appointed for hearing the cause in order as the appeals come in, and notice is given thereof to the appellant's solicitor, who may get a summons served on the other side to appear, &c.

These appeals can only be argued by two counsel on each side: and after hearing counsel on the appeal, and upon the answer on due consideration thereof, the Lords order and adjudge that the decree of the Chancery be varied in such matters as their Lordships think fit, or that the petition and appeal be dismissed, and the decree affirmed with costs, &c. A

The Practice of the

majority of the Lords finally determines the cause.

Sometimes the House of Lords direct an issue at law for trial of some point necessary between the parties; and after such trial, to resort back to the court of Chancery, for their farther directions in that matter.

And printed copies of the appellant's and also the respondent's case are usually delivered to the Lords for their better information of the matter in controversy; which cases, before printed, are always signed by two counsel, viz. the plaintiff's case by two of his counsel, and the defendant's case by two of his counsel; whose respective names are printed at the bottom of the cases.

A petition and appeal to the House of Lords.

Between A B plaintiff,
C D defendant.

*To the Right Honourable the Lords spiritual and
temporal in Parliament assembled.*

The humble petition and appeal of the plaintiff A B.

Sheweth,

THAT M, &c. [Set forth your case.]
That your petitioner some time in or about ——— term, exhibited his bill in the high court of Chancery against the said C D, to be relieved, &c. [Set forth the prayer of the bill.] To which bill the said C D appeared and answered, and thereby insisted that, &c. [Set forth such parts of the answer which be insisted upon against the plaintiff's bill.]

That

That your petitioner having replied to the said answer, and the said defendant having rejoined, the said cause was at issue, and divers witnesses being examined on both sides, the same came on to be heard before the Lord Chancellor of Great Britain the ——— day of ——— 17 , when although the said C D had by his answer expressly sworn, &c. [*The reasons admitted by his answer, and for which you appeal,*] yet his Lordship was pleased to decree that, &c. [*Set forth the decree, and if there were any subsequent proceedings before the Master, or the like, set them forth briefly.*]

That your petitioner is advised the said decree (and subsequent orders) are erroneous, and humbly appeals therefrom to your Lordships.

Your petitioner therefore humbly prays your Lordships to grant to your petitioner your Lordships order of summons to the said C D, to put in his answer to this your petitioner's appeal at such time as your Lordships shall prefix, in order that your Lordships may hear the said cause, and that your Lordships will be pleased to reverse the said decree (and subsequent orders) in the said cause, or grant to your petitioner such relief in the premises as to your Lordships in your great wisdom shall seem meet.

And your petitioner shall ever pray, &c.

A B, (the appellant.)

G H, }
J K, } counsel.

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The respondent's answer.

*The answer of C D to the petition and appeal of
A B.*

THIS respondent, not confessing or acknowledging all or any of the matters or things to be true, as in and by the said petition and appeal are mentioned and set forth, for answer thereunto, saith, that he believes it to be true that such decree (and subsequent orders) as are complained of, were made by the court of Chancery as in the said petition and appeal are mentioned and set forth: but as to the dates, substance and contents thereof, this respondent humbly craves leave to refer thereunto, when the same shall be produced; and this respondent humbly conceives and is advised that the said decree (and subsequent orders) are agreeable to equity and justice, and therefore humbly hopes that the same shall be affirmed, and that the said petition and appeal shall be dismissed this most honourable House with costs.

L M. (counsel.)

In a case where a party had appealed to the House of Lords from an interlocutory order made in the cause, and after lodging his appeal, it was afterwards moved on his behalf, that a receiver of the estates in question might be appointed. On the other side it was urged in opposition to this application, that by bringing the appeal before the House of Lords, the Lord Chancellor's jurisdiction was totally suspended pending the appeal; but the Lord Chancellor said, the practice was, that by bringing the
appeal

appeal before the House of Lords, the Lord Chancellor's jurisdiction was suspended only as to the matter appealed from, but not totally, so as nothing could be done in any other part of the cause not appealed from.

Lord and
Lady Pom-
fret v.
Smith, at
Lincoln's-
Inn Hall,
June 1772,
coram Lord
Apsley.

Of Costs in general.

WHEREVER the court decrees the party to pay costs *personally*, in that case the Master taxes them, and you proceed by *subpœna* and attachment for the recovery thereof: but where the court directs that they shall be paid out of a real or trust estate, and not by the person of the party, if the estate is sold, the costs are usually paid out of the purchase-money, or out of the profits in the receiver's hands; or if the party who is to pay them has sufficient profits in his hands, the court will direct him to pay them thereout, or send him to an inquiry before the Master, whether there is sufficient or not.

Gilb. Chan.
205.

If a bill is filed for the purpose of recovering 5000*l.* and the plaintiff has the fortune to recover 5*l.* only, he shall be intitled to costs to the extent only of his success; and it shall be referred to a Master to distinguish the same: and this rule is founded upon good reason; for if a plaintiff sets up four demands, and prevails only in one, it is unreasonable he should have costs throughout; therefore he must pay costs where he does not prevail, or at least lose all the rest of his costs, if he does not pay them to the other party; and in this case, the Master looks over all the folios of the bill, answers, depositions, and proceedings, and only

ly allows the usual fees of such folios and proceedings which relate to the matter prevailed in, and no farther; and the plaintiff loses all the rest (as he ought,) for setting up a demand which he had no foundation for, and for harassing a defendant without any just cause.

By a standing order of the court, made in Lord Keeper *Wright's* time, no exceptions were allowed to a report of taxing costs; and this rule hath ever been pursued, with this difference, that where the Master allows such costs as ought not to be allowed, or are not allowable by law; in this case, the court will sometimes indulge the party with liberty of excepting touching this point only.

Gilb. Chan.
206.

Wherever a clerk in court, or solicitor, petitions to have his bill taxed, the court never refuses it; but upon debate it has been settled, that the court cannot go so far as to order the client to pay what it is taxed at; this must be recovered by action at law, or otherwise, as the party shall be advised; and here it is taxed as between a client and his solicitor, and not as between party and party; for many things are not allowed upon a taxation between party and party, which however are allowed between a client and his solicitor.

But if a *client* petitions to tax his clerk in court's, or his solicitor's bill, he shall submit to pay what is due; and the court always puts this upon him, and the order is drawn up to pay what shall be found due on the taxation; for it is unreasonable for the client to ask a favour of the court, and then put his clerk in court or solicitor afterwards to recover at law what his bill is taxed at; nor hath the court any hold over him, but where he sub-

mits

mits to pay, and where the order is to pay what shall be found due on the taxation; in that case, the clerk in court or solicitor whose bill is taxed, may take out a *subpœna* for what the costs are taxed at, and proceed by way of attachment for non-payment, as in other cases; and this becomes a personal demand upon his client.

Gilb. Chan.
207.

If the plaintiff obtains a decree, he has generally his costs of suit; but if it be against a trustee not in fault, but who desires only to be directed or indemnified by the decree of the court in the performance of his trust, he shall pay no costs: so infants, executors, or administrators (if they are not in fault,) shall not pay costs out of their own estates; nor shall they pay costs out of the estate of him whom they represent, provided no fault is imputable to him: so also a party suing *in formâ pauperis*, shall pay no costs, though intitled to receive his costs *out of pocket*, and not more; for where the plaintiff, a pauper, had a decree for the duty and costs, and the Master taxed *full costs* as usual for persons not paupers, yet upon motion of the defendant, that he may tax only pauper costs, the

Pract. Reg.
114.

Ibid. 115.

Lord Keeper said, it was unreasonable any one should have more costs than out of pocket; and he ordered the plaintiff and his solicitor to make oath before the Master; and what they swore they had paid, or were to pay, was to be allowed, but no farther.

Præc. in
Chan. 220.

On a bill brought to call a trustee to an account, it was held by my Lord Keeper, that if he by answer submits readily to it, tho' on the account he be found in debt, yet he shall pay interest for the balance only from the time of

Proc. in
Chan. 254.

the account liquidated, and no costs, if he has not misbehaved himself; but where he controverts the account, and afterwards is found in the plaintiff's debt, he shall pay interest from the time of the bill; for in a manner he dares the plaintiff to the account, and therefore must pay costs, as the plaintiff must have done, if he had been found indebted to him.

A B made his will, and devised lands to be sold for raising portions for the plaintiffs, who were his daughters, by a second *venter*; and this bill was brought by them and the executrix to have the will proved, and the trust performed. The

Defendants were his daughters by a first *venter*, and were all married by him in his lifetime, but had not near so great portions as the plaintiffs, who, together with defendants, were his coheirs; and by answer insisted to have the validity of the will tried at bar, which was thereupon ordered accordingly; and at the trial, the defendants perceiving the matter against them, gave no evidence; so there was a verdict for the will. And now the case standing on the equity reserved, the defendants were ordered to join in a sale, but were to have their costs, both here and at law, upon their joining, though it was insisted on the other side, that they ought not to have costs, having, as now appeared by verdict, wrongfully occasioned all expence.

Ibid. 93.

So where a bill was brought by a devisee against an heir to prove a will, the heir cross-examines the plaintiff's witnesses, and refuses to release his right, yet the heir shall have his costs

costs given him upon motion ; otherwise, if he examines witnesses of his own ; but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs ; but on his suit appearing to be groundless, shall pay costs.

2 P. Will.
286.
Vid. also
2 Atk. 424.
3 Atk. 337.
3 P. Will.
374.

Costs do not always follow the event of the cause ; as where the money was found due to the defendant upon account, yet it appearing to be much less than had been claimed by the defendant's answer, in that case the defendant was allowed no costs.

1 P. Will.
376.

Upon an attorney or solicitor appearing to be guilty of a gross mistake, the court will order him to pay the costs occasioned by such mistake ; so governors of a charity, though not guilty of corruption, yet if extremely negligent, will be punished with costs.

Ibid. 593.
2 P. Will.
285.

A legatee or creditor coming in before the Master, and not party to the cause, shall have his costs ; for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge.

Ibid. 27.

If an issue be directed out of Chancery to be tried, and the party plaintiff in the suit gives notice of trial, and does not countermand it in time, upon motion, the court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried *.

An infant who, by the custom of gavelkind was one of three coheirs of a real estate, by his *prochein amy* brought his bill to establish a will whereby that estate was pretended to be devised to him only.

* 2 P. Will. 68. anon. And note, On an issue's being directed out of the court of Chancery, after such issue made up, it is proper to move the court of Chancery for a special jury, if the circumstances of the case require it ; and the court will grant the same.

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The court directed an issue, which was found afterwards against the plaintiff.

The *prochein amy* died before the costs taxed, and the infant came of age, but never afterwards proceeded one step; and the cause being now set down purely upon the costs reserved, it was objected, that where an infant sues by *prochein amy*, it is the *prochein amy* only who is to pay the costs, for any one may bring a bill in the infant's name, and if it be an insolvent *amy*, the defendant may apply to the court in order to have a solvent *prochein amy* named; which, if the defendant does not do, it is his own fault; and it would be an hardship upon the infant, who is not supposed to be capable of judging of the right, propriety, or justice of a suit, to be subject to the costs of it, or to be put to his remedy over against his *prochein amy*; that it was plain in the present case the infant had no remedy over against his *prochein amy*, he being dead:

Lord Chancellor: At law the infant is liable to pay the costs, if the judgment be against him; as if an infant brings an action of battery, and has a verdict against him, he must pay the costs; and if the common law be so, why should it not be so in equity? otherwise, an infant would be left at liberty to plague mankind as he thinks fit. And

The court being informed by the register and clerk in court, that the course was to dismiss the infant's bill generally with costs, without mentioning who should pay them;

His Lordship said, he would dismiss this bill with costs; and (as he apprehended) upon a general dismissal, the defendant had his election

tion whether he would sue the infant or *prochein amy* for such costs.

2 P. Will.
297.
But note, on
a rehearing,
the bill was
dismissed
without
costs.
1 Str. 708.

On a bill to settle the boundaries of a manor, it was decreed, that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue; and the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also the costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity *.

On a bill of partition no costs on either side, because it is for the benefit of both parties.

The plaintiff in a bill was a servant to a foreign ambassador, and consequently his person privileged by the act of 7 Ann. c. 12. †; it was moved, that the plaintiff should not go on in his bill, until he gave security by a bond in 40l. penalty for the payment of costs of suit, if awarded against him, in the same manner as where a plaintiff is beyond sea; and a precedent was cited, where the like order was made in the case of an ambassador's servant, plaintiff in this court.

Whereupon the defendant obtained an order that the plaintiff's proceedings should stay until he, with a surety, gave such bond in 40l. penalty for answering costs, if awarded.

2 P. Will.
452.

Motion on the part of the defendant, *after applying for time to answer*, that the plaintiff,

* 2 P. Will. 376. But in *St. Luke's v. St. Leonard's, Bro. Chan. Rep. 40.* Lord Thurlow thought that a bill to settle boundaries of a parish would not lie, it being merely a question at law. *Ibid.* in notes, Cox's edition.

† Note, By this act, all process against ambassadors and their servants are made void; so that if the bill should be dismissed, no process could issue against them.

who

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who in his bill charged himself to be resident in *Florence*, should give security to answer costs; and the case of *Glamorgan v. Rugby* was cited, where the Lord Chancellor held it pretty much in the discretion of the court, and might be taken advantage of *at any time*, on the circumstances:

Lord Chancellor: If on the face of the bill the plaintiff appears to be beyond sea, or if at the time of filing the bill it appears the defendant knew of it, he may apply for security to answer costs; but advantage should be taken of it in the first instance *before answer*, or *time prayed to answer*; otherwise it is waived: if indeed the defendant is a stranger to it, and it comes to his knowledge at any time in the course of the cause, it may be prayed; but here it is waived, it appearing on the face of the bill.

* Vol. 25.

Baron and feme bring a bill to redeem a mortgage; the defendant pleads to the bill, and the plea over-ruled, and costs given to the plaintiffs, which, by the course of the court, are 5l.; the baron dies, the feme by survivorship shall have the costs.

* P. Will.
497.

A suitor having paid the officer (register) his fee, and the officer having neglected his duty, by which means the process becomes irregular, the suitor is to pay the costs, but he to have them over against the officer; and though the officer in such case die, yet this being a duty and a matter of contract, his executor will be liable.

* P. Will.
658.

In a case where there had been no demand, nor any rent paid for *thirty* years, and the person who was intitled recovered it by a verdict; Lord *Hardwicke*, Chancellor,

Said,

Said, The defendant must pay the costs at law; but as the laches arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a great length of time, he shall not be allowed costs against the defendant in equity.

2 Atk. 14.

Note, In notorious frauds, the court *anciently* made a defendant pay *exemplary* costs; but that has been for some time disused, from the difficulty of carrying it into execution; so where a plaintiff is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and the bill shall be dismissed with costs.

Ibid. 48.

A bill was brought against an executor of an executor, for a debt of the first testator; the defendant denied assets, but at the same time set out specially in his answer, that the estate of the two testators were so blended together, that he could not positively say whether there are assets or not; but,

On a reference to a Master, it came out, that there were assets enough to pay the plaintiff's debt, and something over: and

The Master of the Rolls was of opinion, that the executor in this case must pay the debt, in the first place, to the plaintiff out of the assets; and if there are any left, after such payment, he may retain to pay himself the costs of this suit; if there had not been the favourable circumstance of the confusion arising from the two estates, the executor must have paid the costs out of his own pocket, and the residue of the assets applied to other debts.

Ibid. 81.

Costs in equity are entirely in the discretion of the court; but where they think it would accelerate

accelerate a decree, the court chuses to postpone the consideration of the costs, till the cause comes back from the Master, though there might be grounds enough for decreeing costs even at the hearing of the cause; but a plaintiff may apply for costs where a defendant gives unnecessary trouble in carrying a decree into execution; for in equity, as well as at law, costs follow the justice of the demand.

2 Atk. 112.

Ibid. 126.

Notwithstanding a testator directed that his executors, for any expences they shall be put to, shall be allowed their costs out of his estate; yet where the executors have been guilty of a plain act of fraud, the court have decreed costs against them.

Bill by plaintiff for an account of rents, and to be let into possession against defendant, who was in possession under an *elegit* for satisfaction of a debt. Account decreed at the Rolls. Afterwards report, that defendant had received 93l. 11s. 3d. more than due to her. Cause coming on upon report, it was ordered, that possession should be delivered, the defendant to pay the 93l. 11s. 3d. *together with the plaintiff's costs*; from which order defendant appealed generally, and the only reason for the appeal was the costs.

Two questions on the hearing; 1. Whether the rule is so general that a party cannot appeal for costs? 2. Whether, as the defendant was an incumbrancer, the estate is not as much liable to pay the costs as the debt?

Lord *Hardwicke*, Chancellor, declared the rule is not so general with respect to parties appealing for costs only. That in particular cases such rule may, and has been dispensed with;

with; and thought it ought to be dispensed with in this case; and the decree was reversed as to costs.

Query, Whether the court will dispense with the rule only in such cases where it appears on the face of the decree that costs are improperly given? or whether they will do it where they must go into the merits of the cause?

Ambler's
Rep. 520.
and the
cases there
cited.

Bill by A B, *who was disinherited*, to have inspection of deeds and writings; and there appearing to be no title in the plaintiff, the cause was set down for further directions by the defendant, and it was prayed that the bill might be dismissed with costs.

Lord Chancellor: There are two reasons against giving costs in this case. 1. It appears plaintiff was intitled under an entail, which was cut off, and had a right to see how he was bound; and although fines and recoveries are of record, yet he might not, from the inspection of them, know what estates were affected by them, or how far.

If an heir at law brings a bill in this court for a discovery, I would not have it understood he shall pay costs; there is no pretence for it. If a motion should be made in such case for costs, he should move to amend, and pray inspection of deeds, and the court would permit him to do it, and not give costs against him: bills are seldom or ever brought by an heir at law for a mere discovery, but generally for production of deeds, and then relief is prayed.

Secondly, Here is an honour left destitute of an estate: it is a gratitude and duty due to the crown to have an estate go with the title. It is a dishonour to the crown and the public
not

1 P. Will.
481.

2 Atk. 424.

3 Atk. 387.

Ambler's
Rep. 163.

not to do so; this reason governed in *Shales* and *Barrington*.

Proposals being made by the counsel for the defendants, that the bill should be dismissed without costs; but if plaintiff should molest them, they should be at liberty to apply for costs; it was agreed to by the other side, and ordered accordingly.

Petition to confirm the Master's report of maintenance and costs. Lord Chancellor doubted whether he could order the costs, for the reference was made *without any suit brought*, which he said was a new method, first introduced by Sir *Joseph Jekyll*, and since frequently practised; but that it would be going much further to order costs, of which he knew no instance. A precedent *ex parte Whitaker* was cited; but as the particular time and circumstances of that case were not stated, Lord Chancellor directed the precedent to be produced to the register, and thereupon he was to draw the order in the present case, that the guardian should be allowed the costs in his account.

Ibid. 146.

If a bill be referred for *scandal and impertinence*, and so reported, exceptions being taken to the report, and allowed, the plaintiff shall have the costs of the reference; but he shall not, on exceptions being allowed to the Master's report of irregularity.

Ibid. 464.

It is conscience, and not any authority, which directs this court in giving costs; and therefore in equity, costs are entirely discretionary, and are given to the time of the decree; and the title respecting them in this court is not at all conformable to the rule at law; for at law *unica directio fiat damnorum*, and therefore they do not from time to time direct costs, but

2 Atk. 552.

wait till there is a final judgment: so where ^{2 Atk. 400.} there was a suggestion to the court, that the poverty of the plaintiff would not allow her to carry on the cause, unless the court would direct the defendant to pay something to the plaintiff in the mean time; the Master was accordingly ordered to tax the costs decreed to be paid by the defendant to the plaintiff; and when they were so taxed, the same were directed to be paid to the plaintiff, to enable her to go on with the cause.

Ibid.

Petition by A B, to be discharged from a contempt and custody, for non-payment of costs taxed for scandal and impertinence, against C D, who had executed a release to A B, which release, it was insisted, should bind E F, the clerk in court, who carried on the prosecution against the petitioner A B. And *per*

Lord Chancellor: The clerk in court has a general lien on the duty recovered by his diligence and expence, which extends as well to collateral proceedings as to a decree: but it is objected, that the client has released it to his adversary, and that binds his solicitor or clerk in court; who, though they have originally a lien on what has been recovered by their expence, diligence, and costs, yet that is not to extend to that degree as to prevent the client fairly and honestly from making an end with his adversary: I am of that opinion, provided any thing appeared to be paid. If the client had by composition, or any reasonable consideration for the costs, made an end with his adversary, I would not suffer this equity to be set up; but if a clerk, in court having this equity, shall be discharged by a mere volun-

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tary release executed by his client and his adversary, he might be defeated by a collusion. This is the distinction; the costs are not paid; no composition or consideration; but a mere voluntary release set up to defeat the clerk in court, which might be done in any case, if the court should suffer this.

2 Ves. 26.
Ibid. 111.

Therefore as to this contempt, and the attachment thereon, let A B, the petitioner, be discharged on payment to E F, the clerk in court, it appearing that C D has executed a release.

Costs were directed to be refunded on reversing an order for allowing a demurrer; and this is agreeable to the general rule of law; for if a judgment is reversed on a writ of error, the party is always restored to whatever he lost by that judgment; and consequently, if that judgment was executed, and costs levied, they must be restored. If a bill is dismissed with costs; the decree not signed, or inrolled, but however process taken out for the costs (which may be) and levied; the plaintiff applies to rehear, and the former decree is reversed, those costs must be refunded; the defendant cannot retain them against the plaintiff, when the plaintiff has prevailed.

2 Ves. 100.

Appeal from a decree made by Mr. Justice Abney, sitting for the Master of the Rolls, for not giving costs to the defendant upon a bill brought to have an account taken, and for relief and satisfaction in the nature of a redemption of an estate, which the defendant had extended by *elegit*, upon a judgment on a debt originally created by bond.

The general rule, that there could be no appeal for *costs only*, was insisted on; the costs

were discretionary in the court, and not of right to be given to a mortgagee, who may even be made to pay costs, if he misbehaves; as where he insists on an estate not to be redeemable, which appears to be redeemable. And *per*

Lord Chancellor: The defendant could only be obliged to account according to the extended value: but this court, since Lord *Cowper's* time, goes farther, and obliges the creditor to account for the profits really received: he is clearly intitled to his costs on the merits, if not precluded by that rule: the foundation of that rule was to prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which, as the reason of mankind might differ, it would create perpetual appeals; but it seems somewhat strict and hard to adhere to it; for since the stamp duties, costs come to be very material; yet if it was to be laid down generally, that an appeal might be for costs, it would cause that general inconvenience to which a particular inconvenience ought to give way: but if a *sound distinction* from the rule can be made, it ought to be allowed; and it will be very unfortunate, if, *in this case*, the defendant should be precluded thereby; for being an incumbrance for a just debt, and having a lien on the estate for his costs, as well as his demand, it seems to be an exception, and different from the court's not suffering matters to be over-ruled merely for costs. Let the defendant therefore have his costs taxed.

So upon a rehearing before Lord *Henley*, after a decree by Lord *Hardwicke*, in which costs came to be the only matter in dispute; the

1 Ves. 250.
Owen and
Griffith.

Cooper and
Scott, Nov.
19, 1757.

question was, whether there could be a rehearing for costs only, and a difference taken at the bar between the case of costs, charged on the person (where it was admitted there should be no rehearing), and costs out of the estate, and the case of *Owen and Griffith* was cited; and the

Lord Keeper said, a rehearing for costs only ought not to be encouraged, because they are merely discretionary, and depend on circumstances, but thought there might, on particular circumstances, be such rehearing; and he affirmed the decree*.

Where a debt of a testator is recovered against an executor at law, costs are given *de bonis propriis*; but in equity it is discretionary
 3 Atk. 119. whether the court will make him pay costs or not.

The Master to whom it was referred, reported the proceedings under a commission for examination of witnesses irregular; on exceptions, the court thought them regular, and allowed the exceptions, and the party who succeeded had his costs of the application. Lord *Hardwicke* discharged the order for costs, because the plaintiff's was not a vexatious proceeding, but in the Master's opinion well founded; and the rule of this court is never to give costs, but where no just ground appears for the proceeding: so

On exceptions to an answer for insufficiency, and so reported; upon exceptions to the Master's report, the court held the answer to be sufficient; the party succeeding in the ap-

* 1 Bro. 143. (cited), where this doctrine is affirmed by Lord *Thurlow*, and held by him, that there should be no appeal or rehearing for costs only, unless upon an apparent mistake. *Wadman v. Kent*, appeal from the Rolls.

plication not intitled to costs, but they shall wait the event of the cause.

3 Atk. 235.

Note, On a special motion, and stating particular circumstances, the court may give costs, though the Master reports in favour of the other party.

Ibid.

Where costs are decreed to all parties out of a real estate, though one of them, who was intitled to receive costs, died before they were taxed, they do not *moritur cum persona*; but the heir at law is intitled; for if any thing had remained undecreed, and to have been done, the representative of the deceased party by reviving would have been intitled to the costs, even if they had not been directed to stand a charge on the real estate.

3 Atk. 773.

There was a decree for a sum against an executor, with costs out of assets; the executor pays the sum, but not the costs, and then the plaintiff dies, and a bill is brought to revive for costs; and it was objected, that a bill to revive for costs only was improper, and that the payment out of assets was only incident to the costs in respect to the sum decreed; but the

Lord Chancellor (*Hardwicke*) ordered the cause to stand revived; for the rule not to revive for costs only, he thought a hard rule, the costs being frequently more than the debt; and this case was not within the rule; for if it was not a decree *in personam*, but executory, and to be paid out of assets; and if the executor had died, the plaintiff might have revived against the representative of the testator, and might have pursued the assets into whatever hands they came*.

* 3 Atk. 773. And note, This court has followed the rule of law, where there is a judgment, costs are ascertained and taxed; but if no judgment, the costs are lost.

On a question as to costs, on a case of pure assignment of dower before commissioners, and particularly of the costs of a survey of the estates;

Lord Chancellor said, that in cases where there is an apportionment of dower by commission, not by writ, costs are not to be given; unless previous questions are raised, in litigating of which the party is vexatious. There are so many precedents, and they are reasonable and analogous to the proceedings at law: in a writ of dower, or on assignment of dower, no costs are given, unless there be a forfeiture, when the statute (of *Gloucester*) gives damages, or where there are collateral circumstances, or where the dower is demanded upon

¹ Bro. 134. a feoffment or other title.

A cause was brought on upon bill and answer, and appearing to be vexatious, and the plaintiff not having replied to the answers merely to avoid costs, the question was, whether the court could give full costs or only 40s. ? the

Lord Chancellor said, that in such cases the court would not hold itself bound by the rule of 40s. costs, but would give the whole costs of the vexatious suit, and that it had been so done by Lord *Hardwicke*; and his Lordship therefore directed the costs to be taxed upon the dismissal of this bill.

² Atk. 288.

³ Atk. 1.

¹ Bro. 403.

Plea to a bill of revivor, in a case where nothing remained but the matter of costs, which had been ordered to be paid into the Bank; and being unpaid at the time of the death of the party, the question was, whether a bill of revivor would lie against the representative? In support of the plea it was argued,

gued, that where the party who is to pay costs dies, it is a personal debt, and dies with him, unless the costs are ordered to come out of a particular fund; although where the party who is to receive the costs dies, his representative shall have his remedy against the party decreed to pay.

For the plaintiff, it was objected, that this doctrine only held where the costs were not taxed, but that as soon as the costs were liquidated, the debt was become certain; and it was proper matter for a bill of revivor and supplement, as this in truth was, it praying an account and payment out of assets. The

Lord Chancellor thought, the costs having been taxed, this case was not within the general rule, and made it certainly matter of revivor; if they had not been taxed, he might have laid hold of the circumstance of their having been ordered to be paid into the Bank, as taking the case out of the rule; and therefore over-ruled the plea.

Where the material issue is found for the party who sets down the cause for further directions, he must have his costs at law.

After an order to have costs taxed, the clerk or solicitor for the party that is to have them delivers in a bill thereof to the Master to whom the same are referred, who gives the other side a copy of the charge (if desired), and on request he gives out a summons for the parties to attend him at a certain time, and so from time to time till the whole costs are taxed, and then he reports the *quantum* to the court; the report being confirmed, and the order duly entered, there may be a *subpœna* to the party to pay them; and if not thereupon paid, the

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order

1 Bro. 438.

Ibid. 420.

Vid. also

2 Vef. 580,

581. where

this subject

is treated of

at large.

Pract. Reg.
116.

order under seal, or if after a decree, the decretal order and writ of execution; and if upon due service thereof, the costs be not paid, then upon affidavit thereof attachment issues, and further process of contempt to a sequestration against the party refusing to pay the costs, if there be occasion.

Where a defendant in *contempt* puts in an answer without paying the costs of the process of contempt, and the plaintiff replies thereto, he hath lost the costs; for by replying, he admits the defendant to be *reftus in curiâ*, and the answer regular.

Ibid.

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C H A P. I.

Of Persons whose Interests are particularly favoured in a Court of Equity ; under which general Head I shall treat separately—Of Infants—Ideots and Lunatics—Guardians and Prochein Amys—Trustees—Feme Coverts—Heirs—Executors and Administrators—Paupers.

And first,

Of Infants.

FROM the observations made on the daily actions of infants, and the conclusions drawn from thence, the laws and customs of every country have fixed upon some particular period, at which they are presumed to be capable of acting with reason and discretion in the regulation of their conduct in the ordinary transactions of life ; and hence in our law the full age of man or woman is twenty-one years* ; which age is completed on the day preceding the anniversary of a person's birth.

Salk. 44.
625.

* At which age he is capable of contracting, and may alien his lands, goods, &c. ; for according to the feudal law, the tenant at this age was out of ward of guardian in chivalry. Co. Littl. 786. But according to the civil law, the complete full age, as to matters of contract, is twenty-five years. Dig. lib. 4. tit. 4.

Co. Litt.
235.

Infants have various privileges and various disabilities ; but their very disabilities are privileges, in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian ; for he is to defend him against all attacks, as well by law, as otherwise ; but he may sue either by his guardian, or *prochein amy*, his next friend, who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause ; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian.

With regard to estates, and civil property, an infant hath many privileges : he shall lose nothing by non-claim, or neglect of demanding his right ; nor shall any laches or negligence be imputed to him, except in some very particular cases. Infants cannot alien their estates ; but infant trustees, or mortgagees, are enabled to convey *, under the direction of the court

* By statute 7 Ann. c. 19. which statute enacts, " That it shall and may be lawful for any person, under the age of twenty-one years, by the direction of the high court of Chancery, or the Exchequer, signified on the hearing all the parties concerned, on the petition of the person or persons for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants, or person or persons intitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any infant or infants are, or shall be seised or possessed by way of mortgage, or of the person or persons intitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said court of Chancery, or the court of Exchequer, shall by such order so to be obtained, direct to any other person or persons ; and such conveyance or assurance so to be made and had as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said infants or infant were at the time of making such conveyance or assurance of the full age of twenty-one years ; any law," &c.

And it is further enacted by the said statute, " That all and every such infant and infants, being only trustees or mortgagees as aforesaid, shall and may be compellable, by such order so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances, as aforesaid, in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust, estates, or mortgages."

of

of Chancery or Exchequer, the estates they hold in trust or mortgage, to such person as the court shall appoint: so an infant who has an advowson may present to the benefice when it becomes void; for the law in this case dispenses with one rule, in order to maintain others of far greater consequence; it permits an infant to present a clerk (who, if unfit, may be rejected by the bishop), rather than either suffer the church to be unserved, till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete; for when he comes of age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. It is, further, generally true, that an infant under twenty-one can make no deed, but what is afterwards voidable; yet, in some cases, he may bind himself apprentice by deed indented, or indentures for seven years; and he may by deed or will appoint a guardian to his children, if he has any. So it is *generally* true, that an infant can make no contract that will bind him; yet, he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.

Stat. 5 Eliz.
c. 4.

43 Eliz.

c. 24

Cro. Car.

179.

Stat. 12 Car.

2. c. 24.

Co. Litt.

172.

This court may, upon petition only, without any bill or decree, make an order to determine the rights of guardianship, in regard the care of infants is lodged in the king as *pater patriæ*, and by the king this care is delegated to his court of Chancery.

F. N. B.
232.

It is said, the king is bound of common right, and by the laws, to defend his subjects, their goods and chattels, lands and tenements; and by the law of this realm, every loyal subject is taken to be within the king's protection; for which reason it is, that *ideots* and *lunatics*, who are incapable to take care of themselves, are provided for by the king as *pater patriæ*; and there is the same reason to extend this care to *infants*. And

This is the reason given in the writ of *de ideotâ inquirendo*, which the king issues out to take care of him; who *regimini sui ipsius, et bonorum, et terrarum suarum, minime sufficit*; which reason also appears in the writ *de lunatico inquirendo*; and *infants*, as well as *ideots*, are said to be under the protection of the crown, as persons equally incapable of taking care of themselves.

4 Rep. Beverley's case.

In like manner, in the case of a charity, the king, *pro bono publico*, has an original right to superintend the care thereof; so that, abstracted from the statute of *Elizabeth* relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney General's name, for the establishment of charities: also in the case of *Berty* and Lord *Falkland*, the Lord *Sommers*, in delivering his opinion, takes notice, that several things are under the care and superintendency of the king, as he is *pater patriæ*, and instances all *charities*, *ideots*, *lunatics*, and *infants*. Indeed, several acts of parliament have made alterations in some cases of this nature, which so far stand altered, and no further; but unless there be express words in an act of parliament for that purpose, the original jurisdiction of this court remains

remains as before; but there is not any one act that has taken away the original jurisdiction of this court with respect to this care and superintendency of *infants, charities, ideots, and lunatics*. Since the statute which took away the court of Wards, the jurisdiction of wardship returns to the court of Chancery; and it appears by the *Register* 21. b. 198. that a writ may issue out of this court to remove the guardian of an infant, and to put another guardian in his stead.

Vid. 2 P.
Will. 120.

Having premised the foregoing observations, I shall proceed to consider,—first, In what manner a suit is prosecuted and defended by infants in this court—Secondly, In what cases the interests of infants are peculiarly protected in a court of equity—Thirdly, How far infants are bound in this court, and less favoured than at law—Fourthly, What acts of infants are good, void, or voidable, so far as the same have a relation to the jurisdiction and authority of this court.—And first,

*In what Manner a Suit is prosecuted and defended
by Infants in this Court.*

AN infant is incapable by *himself* of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit. When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the court of Chancery, his nearest relation is supposed to be the person who will take him under his protection, and

and institute a suit to assert his rights, or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his *next friend*. But as it frequently happens that the nearest relation of the infant himself with-holds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favour of infants, will permit any person to institute suits on their behalf; and whoever acts thus the part which the nearest relation ought to take, is also styled the *next friend* of the infant, and as such is named in the bill. The *next friend* is liable to the costs of the suit, and to the censure of the court, if the suit is wantonly or improperly instituted; but if an infant attains twenty-one, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs.

Treatise upon Pleadings
by English
Bill, 26.

When an infant then exhibits a bill, there is no occasion for a guardian to be assigned to him by the court; but where the infant is defendant, the guardian to be assigned to him by the court is to be called by that name; yet if the guardian be not so called, though it is *at law*, where the infant is plaintiff, it is no cause of demurrer.

If an infant, being served with a *subpœna*, will not appear to a bill, on affidavit of serving the *subpœna*, an attachment issues against the infant (which is in fact never executed), and counsel moves upon the attachment for an order for a messenger to bring the infant into court; and being brought into court, and no one offering on his behalf to be assigned his guardian, the court usually orders the senior

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fix clerk, *not towards the cause*, to be assigned his guardian, to appear to the said bill, and answer and defend the said suit. So if an infant appears to a bill, and refuses to answer, an attachment issues against him for not answering, (which is never in fact executed,) but counsel moves the court upon the attachment for a messenger to bring the infant into court, and the court will make such order accordingly; but commonly some relation or friend of the infant prays the court to be appointed guardian for him, to answer and defend the suit, which the court orders accordingly; and such answer must be always sworn by such guardian: so an infant's answer cannot be given in evidence against him; and the reason is, because in reality it is not the answer of the infant, but of the *guardian who is sworn*, and not the infant; and the infant may know nothing of the contents of the answer put in for him by his guardian, or may be of those tender years as not to be able to judge of it: ^{3 P. Will. 237.} so where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, and not on the infant: but where a ^{2 P. Will. 643.} defendant puts in an answer to a bill brought by an infant, who does not reply to it, in such case, it seems the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer for such omission in the plaintiff*.

But

* So ruled at the Rolls, with some warmth, by Sir Joseph Jekyll, in the case of *Thurston & Dechair. an Infant, v. Nutton et ux*, Trinity 1733, though the reading of the answer was much opposed, for that the plaintiff, being an infant, could admit nothing; and it might be very mischievous, if,

Legard v.
Sheffield,
2 Atk. 377.

But it has been held since by Lord *Hardwicke*, Chancellor, that an infant can admit nothing, and therefore his not replying to an answer does not affect him.

Pract. Reg.
195.
Toth. 109.

If an infant has a guardian assigned to him by the court, or appointed by will, yet where he is *plaintiff*, the course is not to call the guardian by that name, but to call him next friend; but where the infant is *defendant*, the guardian is so called; yet if the guardian be so called, where the infant is plaintiff, it is no cause of demurrer: and it is said, that if an infant be sued here, and the court assigns him a guardian, and a decree passeth against him, he is bound; *contra*, where an infant exhibits a bill by his guardian.

Pract. Reg.
195.

An infant suing here by guardian or *prochein amy*, after publication past, came of age; the cause coming to hearing, it was alleged by the defendant's counsel, that the suit was abated, and no cause in court; but the court did not regard this exception, and to avoid circuity of action, proceeded to hear the cause; and in such case, it is presumed, the course is to proceed without any change.

3 Atk. 511.

The next friend of an infant plaintiff is considered as so far interested in the event of the suit, that he or his wife cannot be examined as a witness; and if their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another responsible person substituted, which the court, upon application, will permit to be done; and

if, by reason of the neglect of the plaintiff, the infant's guardian or *prochein amy*, in not putting in a replication to the answer, such answer should be read, and admitted to be true, though ever so detrimental to the infant's inheritance. 3 P. Will. 238. note (E.)

as some check upon the general licence to institute a suit on behalf of an infant, if it is represented to the court, that a suit preferred in his name is not for his benefit, an inquiry into the fact will be directed to be made by one of the Masters; and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings: so if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit; and when that point is ascertained, will stay proceedings in the other suit.

3 P. Will.
140.

Treatise upon Pleadings
by English
Bill, 26, 27.

When a bill is brought against an infant, he must (if in town) appear in court, and have a guardian assigned to him, by whom he must defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by his guardian, it will be irregular.

And note, An attachment has been awarded against an infant to make him choose his guardian.

Pract. Reg.
195.
Totter 15.

A commission to assign a guardian, and to take the answer by such guardian.

“ George the Third, by the grace of God,
of Great Britain, France, and Ireland, King,
Defender of the Faith, and so forth: To —
greeting. Whereas A B, complainant, hath
lately

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lately exhibited his bill of complaint before us in our court of Chancery against C D, defendant; and whereas we have by our writ lately commanded the said defendant to appear before us in our said Chancery at a certain day now past, to answer the said bill; but forasmuch as the said C D is an infant under age, and cannot answer the said bill, nor defend this suit, without having a guardian assigned in that behalf; know ye therefore, that we have given unto you, any three or two of you, full power and authority, in pursuance of the special order of our said court, to assign and appoint a guardian for the aforesaid infant, and to take the answer of the said infant by such guardian to the said bill: and therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendant, if he cannot conveniently come to you, and assign and appoint a guardian for the aforesaid infant, and take the answer of the said infant, by such guardian, to the said bill, on such guardian's corporal oath upon the Holy Evangelists, to be administered by you, any three or two of you, the said answer being distinctly and plainly wrote upon parchment; and when you shall have so taken the said answer, you are to send the same closed up under the seals of you, any three or two of you, together with your certificate of your having assigned and appointed such guardian as aforesaid, and this writ, unto us in our said Chancery ——— wheresoever it shall then be. Witness," &c.

A commission to assign a guardian, and to take the infant's answer, and the answers of other defendants.

“ George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth: To — greeting. Whereas A B, complainant, hath lately exhibited his bill of complaint before us in our court of Chancery against C D, E F, and G H, defendants; and whereas we have by our writ lately commanded the said defendants to appear before us in our said Chancery at a certain day now past, to answer to the said bill: but forasmuch as the said C D is an infant under age, and cannot answer the said bill, nor defend this suit without having a guardian assigned in that behalf; know ye therefore, that we have given unto you, any three or two of you, full power and authority, in pursuance of the special order of our said court, to assign and appoint a guardian for the aforesaid infant, and to take the answer of the said infant by such guardian, and the answer of the said other defendants to the said bill: and therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendants, if they cannot conveniently come to you, and assign and appoint a guardian for the aforesaid infant, and take the answer of the said infant by such guardian, and the answers of the said other defendants to the said bill, on their corporal oaths upon the Holy Evangelists, to be administered by you, any

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The Practice of the

three or two of you, the said answers being distinctly and plainly wrote upon parchment; and when you shall have so taken the said answers, you are to send the same closed up under the seals of you, any three or two of you, together with your certificate of having assigned and appointed such guardian as aforesaid; and this writ unto us in our said Chancery — wheresoever it shall then be. Witness, "
Ec.

A commission to take the infant's answer by his guardian already assigned him, and the answer of another defendant.

“ George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To — greeting. Whereas A B, an infant, by his next friend, complainant, hath lately exhibited his bill of complaint before us in our court of Chancery, against C D, *Ec.* defendants; and whereas we have by our writ lately commanded the said defendants to appear before us in our said Chancery at a certain day now past, to answer the said bill; and whereas the said C D hath a guardian already assigned him — ; know ye therefore, that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendant, C D, an infant, by his guardian already assigned him, and the answer of the said other defendant, to the said bill; and therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendants,

ants, if they cannot conveniently come to you, and take the answer of the said defendant, the infant, by his guardian already assigned, and the answer of the other defendant to the said bill, on their corporal oaths upon the Holy Evangelists, to be administered by you, any three or two of you; the said answers being distinctly and plainly wrote upon parchment; and when you shall have so taken the said answers, you are to send the same closed up under the seals of you, any three or two of you, and this writ unto us in our said Chancery — wheresoever it shall then be. Witness," &c.

A commission to take the plea, answer, or demurrer of infants by their guardian already assigned.

" George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To — greeting. Whereas A B, complainant, hath lately exhibited his bill of complaint before us in our court of Chancery against C D and E F, infants, defendants: and whereas we have by our writ lately commanded the said defendants to appear before us in our said Chancery at a certain day now past, to answer the said bill; and whereas the said C D and E F are infants, and have a guardian already assigned them; know ye, that we have given unto you, any three or two of you, full power and authority, in pursuance of the special order of our said court, to take the plea, answer or demurrer of the said infants to the said bill,

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by their guardian already assigned; and therefore we command you, any three or two of you, that at such certain days and places as you shall think fit, you go to the said defendants, if they cannot conveniently come to you, and take the answer of the said infants, by their guardian already assigned, to the said bill, on such guardian's corporal oath upon the Holy Evangelists, or their plea on their guardian's corporal oath, to be administered by you, any three or two of you, upon the Holy Evangelists, or their plea and demurrer without oath, to be respectively made to the said bill; the said answer, plea or demurrer being distinctly and plainly wrote upon parchment: and when you shall have so taken them, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery — wheresoever it shall then be, together with this writ. Witness," &c.
Secondly,

In what Cases the Interests of Infants are peculiarly protected in a Court of Equity.

THE interest of infants is an object of peculiar protection in courts of equity; and therefore if a bill be exhibited here against an infant to examine the title of lands descended to him from his ancestors, he may by answer shew his infancy, and pray judgment whether the parol should not demur till he come of age; so if, in such case, the bill be against any other as guardian or *prochein amy* of the infant, such party may shew the special matter, and conclude judgment, "*If the court will*
7 *proceed*

proceed therein," before the infant attain his age of twenty-one years; but for other matters against an infant the suit shall proceed.

Pract. Reg.
194.

A bill was brought by a bond-creditor against the heir and executor of the obligor, to have satisfaction for the debt due upon a bond out of real and personal assets; the heir insists that as to him the parol ought to demur, for that he is an infant, and the bill charges his interest, which came to him by descent from the obligor; the parol shall demur until the defendant comes to full age, as well here as at law: and,

Ordered, that the cause stand in *statu quo* until the infant heir comes of age; but as to the other defendant, the executor, he was decreed to account, and make satisfaction out of the personal estate, as far as the same would extend.

Per Lord
King, Chan.
Trin. 12
Geo. 1.
Hayward v.
Dixon.

Though an infant *himself* cannot bring an account against his guardian, until he comes of age, yet a third person may bring a bill for an account against the guardian, even during the minority of an infant; so in all decrees against infants, even in the plainest cases, a day must be given them to shew cause, when they come of age*.

Where an infant in his bill, by mistake of his guardian, submits to any thing which will be prejudicial to him, this will not be binding upon him, but he will be allowed to amend; ^{2 P. Will.} so upon a decree against an infant, unless cause ^{387.} within six months after he comes of age, the

* 2 P. Will. 120. Vid. also 1 P. Will. 304. Fountain v. Caine et al., where it appears that an infant, on his coming of age, and before the decree made absolute, may put in a new answer. Vid. also the case of Sir John Napier v. Lady Eslington, 2 P. Will. 401. 2 Vef. 484.

2 P. Will.
401.

infant may answer, make a new defence, and examine witnesses anew.

Ibid. 645.

Where one has been in possession of land belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the time of the first accruing of his title, and not from the filing of his bill only.

Proc. in
Chan. 284.

2 P. Will.
549.

3 P. Will.
387.

2 Vef. 559.

A petition upon the act of the 7 *Ann. c. 19.* was read, for enabling infants of the age of twelve years, or upwards, on whom any trust estate or mortgage is devolved, to convey to the *cestui que trust*, or mortgagor, on payment of the money to the executors; the petition set out the conveyance in trust to three persons, and that such a one, being the survivor, was dead, and the estate in law devolved upon an infant, who was in court; also the declaration of trust was read, and the consent to the next heir at law to the infant required; and then an order was made for the infant, by her guardian, to convey over her trust estate to the *cestui que trust*, and the conveyance to be settled by the Master; but the court will not, on motion or petition, order an infant trustee to convey, *unless the trust appear in writing*; but in such case, will leave the *cestui que trust* to get a decree by bill: for the statute enabling infant trustees to convey, extends only to plain and express trusts, not to such as are implied, or constructive only: so also it has been held, that an infant is not within the meaning of the statute of *Ann.* above mentioned, who has an interest in the estate intended to be conveyed, or if there is a doubt whether he has an interest in it of his own, or not.

On

On a motion made for the executor of the mortgagee, it was referred to a Master to see whether the heir of the mortgagee was a trustee within the act 7 *Ann. c. 19.*; the Master reported him to be a trustee within that act; upon which report an order was made, that the heir should assign over the mortgage to such persons as the executors should appoint. And now a motion was made, for the defendant to set aside the report, because the heir was not a trustee *for the executor* by the meaning of the act, and because the reference was made on a motion, whereas the statute requires it should be by petition. And,

For the executor it was urged, that the constant practice is, to pray a reference by motion, as well as by petition. Petition originally signified a bill, but a motion is a petition; and the word is to be understood of proceedings in any summary way, by way of distinction to the proceedings by bill and answer. But it is said, this case is not within the statute, because the heir of the mortgagee is a trustee for his executor only by implication of law; but implied trusts are taken notice of by acts of parliament, as by the statute of frauds and perjuries; and it was adjudged in the case of *Bertie v. Vernon*, that the heir of the vendee was a trustee within this act, for the person who paid the purchase money. The heir of the mortgagee is a trustee both for the executor of the mortgagee, and for the mortgagor, and is doubly within the statute, as a mortgagee and trustee both, and he is bound to convey either at the petition of the mortgagor, or of the *cestui que trust*.

Lord

The Practice of the

Lord Chancellor: A motion is a petition not reduced into writing, and presented; and I do not know that the statute requires those circumstances, and the general practice is to pray a reference by motion; and if the order is not according to the statute, it is void, and without authority. There can be no doubt but a mortgage in fee descends on the heir of the mortgagee, but it is as certain that the money belongs to the executor; so that the heir is only his trustee; and this was the very inconvenience the statute was meant to remedy, that the mortgagor might be willing to pay the money, or the executor might want it; and that in either case they should not be obliged, as formerly, to wait the full age of the heir.

Mosely, 197.
pl. 109.

Where any person enters upon an infant's estate, and continues the possession, the court of Chancery considers him as guardian, and will decree an account, and to be carried on after the infancy is determined, unless the infant, after being of age, waives such account.

1 Atk. 485.

* Vide the rules of the common law as to the parol demurring in Markal's case, 6 Co. 3.

† Vide the case of Sir John Napier v. Lady Ettingham, 2 P. Will. 401.

Infants when they come of age are certainly intitled to put in a new answer, and to make a better defence, if they can; and this rule is founded upon the reasoning of all other courts, where the parol is allowed to demur till the infant comes of age; for at law, even where the suit is brought by an infant as demandant, the courts in some cases will admit the parol to demur, but there they make a difference between droitures and possessory actions*; so in equity, even where the infant was *plaintiff*, the court has in some few instances given him a day to shew cause; but then there must be some extraordinary circumstance†: so where

an

an infant comes to this court before he is of age, and prays he may be allowed to put in a better answer, it was said by the court, that such was a proper application; but then it is not an application of course, but must depend upon circumstances, as where he might not be able to come at the same evidence when he came of age, or where the fact he wants to examine is of long standing, and the witnesses to that fact consequently very old, and may die before he attains his age of twenty-one years. 2 Atk. 532, 533.

A child in *ventre sa mere* is in *rerum natura*, and is as much one, as if born in the father's lifetime; and this court will grant an injunction to stay waste, in favour of an infant in *ventre sa mere*. Ibid. 117.

The court does not usually make any decree by consent, where infants are concerned, without referring it to a Master to inquire whether it will be for their benefit; but when once the decree is pronounced, without that previous step, the authority is the same as if it had been referred to a Master, and he had made a report that it would be for his benefit: so an order for maintenance, though usually made upon a reference to a Master, if made without would be equally binding. 1 Bro. 434.

A petition was presented to the Lord Chancellor by the testamentary guardians of A B, setting forth, that he was going abroad on his travels, and would not be under their inspection, and therefore desiring they might be discharged of their trust, and *new guardians appointed*; the Lord Chancellor, with some warmth, refused it, as being never done at the application of the *guardians themselves*; and if they would

Ambler's
Rep. 146.
where it
appears the
Lord Chan-
cellor grant-
ed the pray-
er of this
application
with great
reluctance.

would not continue to act in the trust, as they had accepted it, the court would compel them; but afterwards, by the application of the infant, and by consent of his relations and guardians, other persons were appointed to have the care of him till further order.

A school-boy contracts a debt of 59l. for burgundy, claret, &c. with G, a victualler, in the space of five months time; in a few days after he came of age, G prevails upon him to give a note for 59l. without producing any account, or delivering a bill. The court, upon the circumstances of the case, decreed the note to be delivered up to be cancelled; and said, there is no difference either in law or equity, between an infant of sixteen or seventeen, or one turned of twenty; the latter, if imposed upon, being equally relievable with the former; for until an infant attains twenty-one, he is considered as such: so where an unconscionable bargain is made with an infant before he comes of age, the court, on a bill brought even by the executor, will order it to be cancelled; for attempting thus to substantiate such a bargain made with an infant, during his infancy, is a principal ingredient with a court to relieve.

2 Atk. 34,
35.

Ibid. 25.

There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill.

2 Vesf. 24.

1 Vesf. 461.

J W, by his will directs his real estate to be sold after his wife's death, and the money arising

ing therefrom between R U and five other persons. R U is an infant, and, as heir at law to the testator, had the legal interest in the estates. "Though the usual practice is for the parol to demur till the infant comes of age; yet *it being for his interest*, that the estates should be sold, and as, in this case, there was a trust to be performed, and the court can see to a proper application of the money;" Lord *Hardwicke* decreed a sale; he declared at the same time, he did not mean by this direction to break in upon the rule of the parol demurring.

3 Atk. 117.

Thirdly,

How far Infants are bound in this Court, and less favoured than at Law.

IF an infant make an exchange of lands, and continues in possession after he comes of age, he shall be bound by it; so also where an infant desired the lands subject to a trust for payment of younger children's portions might not be sold, and offered by his answer to settle other lands for raising the portions, it was held he should be bound by the offer made by him in his answer, if the other side were thereby delayed, and if the infant did not immediately after his coming of age apply to the court, in order to retract his offer and amend his answer; so it hath also been ruled, that if an infant makes an agreement, and receives interest under it after he comes of full age, such agreement shall be decreed against him.

2 Vern. Per Cur.

2 Vern. 224.

1 Vern. 132.

It has been held, that where one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account,

count, the statute of limitations is a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust, as being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account against him at law, and therefore no necessity to come into this court for the account; but the reason why such bills are brought here, is from the nature of the demand, that they might have the discovery of books, papers and party's oath, for the more easy taking of the account, which they cannot so well do at law; but if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases.

Prec. in
Chan. 518.

As the above case is stated in the register's book, it appears that the bill was filed 13 years after the infant had come of age, and enjoyed the estate, without demanding any account. (Ibid. in notes.)

A feme infant seised in fee, on marriage with the consent of her guardians, covenants in consideration of a settlement to convey her inheritance to her husband; if this is done in consideration of a competent settlement, equity will execute the agreement, though no action would lie at law to recover damages*; so it has been decreed that an infant is bound by a settlement made on her marriage, where it was made with the approbation of parents and guardians †: so if the lands of the wife were no more

* 2 P. Will. 244. Vid also *Lacey v. Moor*, 3 Bro. P. C. 514. *Price v. Says*, Barnard, 122. *Scamer v. Bingham*, 3 Atk. 56. *Durnford v. Lane*, Bro. Ch. Rep. 106. *Williams v. Williams*, ibid. 152.

† *Harvey v. Ashley* and others, 3 Atk. 615. Note, Marriage agreements differ from all others; as soon as the marriage is had, the contract is executed, and cannot be rescinded; the children are equally purchasers under

more than an adequate consideration for the settlement that the husband makes, and after the marriage the wife should die and leave issue, who would be entitled to portions provided for them by the settlement, it would in that case be very reasonable to affirm that settlement.

3 Atk. 615.

Though at law no jointure upon a woman even of full age could bar her of her dower, yet the statute of *Hen. 8.* makes it a bar; and a jointure will even bind an infant* and preclude her from dower.

Where there was a submission to an award by A B on the one part, and the defendant, an

under both father and mother, and therefore they cannot be set aside, because it would affect the interest of third persons, viz. the issue. All other agreements are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie: in marriage agreements it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance.

* 3 Atk. 612. Note, The important question whether a jointure on an infant before marriage may be waived, was not quite settled till the case of *Drury and Drury*, which was heard before Lord Chancellor Northington, Hil. 1 Geo. 3. The points determined by Lord Northington in that case were, first, that the statute of 17 Hen. 8. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore, that notwithstanding a jointure on an infant, she may waive the jointure, and elect to take dower. Secondly, that a covenant by the husband, that his heirs, executors or administrators, shall pay the wife an annuity for her life, in full for her jointure, and in bar of her dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute. Thirdly, that a woman being an infant, cannot by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate. From this decree by Lord Northington, there was an appeal to the House of Lords, and after hearing the judges some time on the question, whether a jointure on an infant could be waived? on which they were divided in opinion, the decree was wholly reversed. See the printed cases in the House of Lords of the year 1762. Before *Drury and Drury*, the only judicial opinions as to the effect of a jointure upon an infant, were Sir Jos. Jekyll's, in *Gray and Willis*, against its barring, and Lord Hardwicke's, in *Leys and Price*, and in *Harvey and Ashley* to the contrary. Vid. Vin. Dower. Q. 4. pl. 12. *Barnard. Chan. Rep. 117. Hargrave's Ed. Co. Litt. p. 37. a.*

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infant, and his guardian, on the other part, the award was to this effect, That during A B's life and the infant's minority, the plaintiff and defendant should be at liberty promiscuously to dig lead ore in, &c. and that the profits should be divided equally between them. A bill was brought to confirm the award, and the court being of opinion the infant was bound by it, indemnified the trustees for what they had done, and decreed according to the prayer of the bill, that the award should be established *.

So where A was seized for lives of a church lease in trust for an infant; on a treaty of a marriage between the infant and B, and 1000l. portion, an indenture was made with the consent of A B the guardian, whereby the infant covenants that the lease should be surrendered, and a new lease taken, and B's life put therein for her jointure; A was made party only to shew his consent: the marriage was had, the portion paid, the husband died, the lease surrendered, and the wife's life put in: the widow sued A to assign for her life, and decreed accordingly; and A pretending the trust was in the first place to pay debts to him, it was decreed the debts should be paid out of the trusts, after the widow's death: this decree was affirmed on a rehearing.

^a Chan. Caf.
211.

A married B, who had an estate in land and a fortune in money; they being both *infants*, an act of parliament was obtained for settling a jointure on the wife in bar of dower, but to cease if she did not settle her land when of age, but nothing said as to the *personal estate*: part

* In the case of the Bishop of Bath and Wells v. Hippeley, 28. Car. 2. cor. Lord Nottingham.

of the fortune is a mortgage for 1300l. taken in a trustee's name. The wife when she came of age settled her own land, and afterwards the husband dies; the question was, whether this money should go to the executors of the husband, or as a *chose in action* survive to the wife?

Lord *Cowper*, then Lord Keeper, said, I lay no stress upon the declaration of trust, the law of this court will presume a promise; and in all cases where a settlement is equivalent, it shall be intended the husband was to have the portion, the wife shall not have her jointure and fortune both; and the rather in this case because a trust, and the husband could not come at it, so as to alter the property, without the assistance of this court; and the defendant was condemned in costs.

2 Vern. 501.
This case

shews, that though there was an act of parliament in consideration of a real estate settled by both sides, yet no notice was taken of the money portion.

One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming to age devises his lands for payment of his debts: held, that this debt contracted during the infancy is within the trust; it was also held, that where an infant borrows money and applies it towards payment of his debts for necessaries, he is liable to pay this in equity, though not at law.

1 P. Will,
559.

What Acts of Infants are good, void or voidable, so far as the same have a Relation to Proceedings in this Court.

IF an infant, who contracted a debt during his minority, shews his consent to it by confirming it after he comes of age, it will effectually bind him, though it was voidable at his election.

² Atk. 245.

A devises his real and personal estate in trust for the sole and separate use of his daughter (a feme covert) for life, and to be at her disposal, with power notwithstanding coverture to dispose thereof. She, when nineteen years of age, in pursuance of her power disposes of it by will; this was held not to be a good execution of the power as to the real estate, which may be claimed by the heir at law, although at the same time claiming a legacy; nor is the husband of the infant intitled to be tenant by the curtesy; for the court said there was no precedent either in a court of law or equity, where it has been held, that a power over a real estate executed by an infant is good: so wherever a man makes a settlement, and a limitation to his first and every other son for life, with a power, as each shall come into possession, to make leases and a jointure, it has been said *arguendo*, that there is not an instance to be shewn where it has been held that an infant, on whom this power devolves, could make a lease or a jointure; and there have been numberless acts of parliament to enable an infant to make a jointure, and others to enable them to make leases, which implies it cannot be done without;

³ Atk. 696.

¹ Vef. 299.

so

so there have been instances of guardians being appointed, in case the limitation should take place in an infant, to make leases for him.

3 Atk. 704.

But as to the general question of powers in the large sense of the word, there are several kinds of powers which infants may execute; as where an infant is a mere instrument or conduit-pipe, and his interest not concerned. Lord Coke in his Comment on Litt. p. 52. sec. 66. says, "Delivering seizure is a mere ministerial act, *and requires no judgment or discretion:*" but though the latter words are expressed generally, the law *anciently* was not so; and in Co. Litt. 128. a. Lord Coke himself cites a passage out of the *Mirror*, in which it is expressly said, *an infant cannot be an attorney*; and in the sense of an attorney in a court of justice he cannot be; but when we speak of an infant's being attorney, it is a good deal different from powers over *real-estates*: before the statute of *uses*, the power was over the use; therefore all things necessary to be done over legal estates were done by way of conditions: and this was the method of exercising an authority over the legal estates; and at law an infant might perform a condition where it was said for his benefit.

Per Lord
Hardwicke,
Ibid. 710.

As to other kinds of powers by an infant:—An infant may present to a church; and what is the reason? because a presentation is not a thing of profit, of which the guardian can make any benefit: but the strong ground the law goes upon is, there can be no inconvenience, because the Bishop is to judge of the qualification of the clerk presented:—so when an advowson was conveyed to trustees, in trust to present such person as the grantor, his heirs or assigns, should by deed appoint; and on the prin-

Vide Har-
grave Ed.
Co. Litt.
p. 80
and the
cases there
cited.

ciple that an infant of any age may present, Lord Chancellor *King* confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the guardian guided the child's pen in making his mark and putting his seal.

So the reason why the law allows a fine and recovery suffered by an infant to be good, is, that it supposes he was of full age, and will not presume a judge will take a fine upon any other terms; and a deed to lead the uses, being part of the fine, shall stand: so an infant may, by the custom of *Kent*, and of several manors, alien his estate; and the reason is, because a custom is *lex loci*, and is presumed in law to have a reasonable commencement, just the same as if a private act of parliament was made to give an infant such a power; and a custom being *lex loci*, stands as strong upon this as if an act of parliament had been made for that purpose.

My Lord *Coke*, in *Mary Portington's case* *, says, "The usage has always been upon a common recovery against husband and wife, to examine the wife, and to grant a *dedimus potestatem* to take her acknowledgment upon examination, as in case of a fine." But a common recovery against an infant, although he appears by guardian, shall not bind the infant; for the infant has not such a disposing power of the land as the husband and wife have, but is utterly disabled by law to convey

* 10 Co. 43. a. Note, The disability of a feme covert doth not arise from want of reason; and it is upon this ground that the separate examination of a feme covert on a fine is good, because when delivered from the husband her judgment is free; but an infant's disability is always from want of capacity. Vid. Co. Litt. 246. a, 246. b.

or transfer his inheritance or freehold to others during his minority ; so that in law there is a total absolute disability in an infant; that by no manner of conveyance can he dispose of his inheritance.

By a settlement made with the approbation of trustees, and confirmed *by act of parliament*, a power was reserved to A, an infant, of charging divers of his lands at any time during his life, with the sum of 3000l. ; he borrowed this sum of A, and having executed his power while an infant, died soon after he came of age ; his son brought his bill to redeem on payment of the principal sum borrowed, and the court accordingly decreed a redemption upon the common terms of payment of principal, interest, and costs ; because here was a power given to him to raise the money, and immediately to give security, which was done.

Lord Thel-
murry w.
Dr. Grav,
Silk 538.
also stated in
Evelyn w.
Evelyn,
2 P. Will.
660.

There are many cases where an infant is bound by a contract he has entered into ; as, in all cases where he has advantage by means of the contract ; as if the eldest son promise his father to give the younger son 100l. if the father will desist from making a settlement, which he intended on the younger son, by which means the father desists from the settlement, though the eldest son was an infant, he shall be compelled to pay the 100l.

2 Comyns'
Digest, title
Chancery,
3 R. 5.

Where a male infant marries an adult female, who, by settlement, covenants that her estate shall be settled to certain uses, he is bound by *her* covenant ; for if a woman before marriage conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without any fraud upon the intended husband, such agree-

* 2 Brown's
Chan. Rep.
545.
Siocombe
v. Glubb,
and the
numerous
authorities
there cited
applicable
to this sub-
ject.

† 1 Brown's
Chan. Rep.
106.
and the
authorities
there cited.

ment must be executed, and the husband when of age must answer *her contract**; so it has been determined, that the marriage settlement of a female infant is binding upon her, and no act done by her and the husband can avoid it†; and held, that to bind an infant, the marriage settlement must be fair and reasonable, and not tend to deprive her of every thing.

If an infant sells land for money, with which he purchases other lands, yet this sale made by him shall not be helped in this court, because he is disabled by a maxim in law; but if an infant makes an agreement, and receives interest under it after age, such agreement shall be decreed against him; so if he exchanges lands, and continues in possession after age, he shall be bound by it.

2 Vern. 225.

1 Chan. Caf.
256.

5 Rep. 29.
Cro. Eliz.
719.

1 Vern. 328.

If an infant executor assents to a legacy, such assent shall be good, if there are sufficient assets besides to pay debts, otherwise not; but an infant executor, *before seventeen*, cannot bind himself by his assent to a legacy: so an infant may administer at seventeen, but cannot commit *a devastavit* till of full age. Where an infant is made executor, administration must be granted *cum testamento annexo*, to his guardian or next friend, *durante minoritate*; but the administration ceases when the infant is seventeen years old: so if an infant executrix, before seventeen, takes a husband of full age, the administration immediately ceases; but if an infant is intitled to the administration of the goods of an intestate, administration must be granted to another till he is of twenty-one; because a *minor* cannot enter into a bond, with sureties, to administer faithfully, as required by the statute.

22 & 23
Car. 2.

- Infants

Infants are also enabled by statute to sur-^{29 Geo. 2.}
render leases, in order to renew the same un-^{c. 31.}
der the direction of a court of equity.

C H A P. II.

Of Paupers.

IT often happens that some persons may have a right to an estate, yet not wherewith to prosecute the same, or else may be prosecuted, or made parties to a suit, as knowing much therein, yet have not wherewith to make either a defence or discovery; in such cases, this court (which delights in justice and mercy) will admit such poor persons either to sue or defend *in formâ pauperis*.

The method of obtaining such admission is first for the party to make an affidavit before a Master, *That he is not worth in all the world the sum of 5l. his just debts being first paid, and his wearing apparel and the matters in question, only excepted*; and then draw a petition to the Master of the Rolls, praying to be admitted *in formâ pauperis*, and to have counsel, and a six clerk assigned him, naming whom in the petition.

*Vid. title
Petition,
2d vol.*

When the plaintiff petitions, he must at the bottom of his petition (which differs from the form of a defendant's petition, being special, according to the circumstances of the case) have a certificate under counsel's hand, signed at the bottom of the petition, signifying that he has just cause of suit; and although the bill be filed, he must have a special petition, shortly stating the merits of his cause, and counsel's certificate

*Pract. Reg.
266.*

certificate to be admitted. But if a *pauper* defendant petitions, he only draws a very short petition to be admitted to defend the said suit *in formâ pauperis*, and praying that counsel and a fix clerk may be assigned him; and there is no occasion for any certificate.

Praet. Reg.
266.

This being done, and the affidavit annexed to the petition, he presents the same; and if there appears no cause against it, the Master of the Rolls underwrites an order for the petitioner's admission, according to the prayer of his petition.

And after admittance, no fee, profit, or reward (except *pauper* fees) is to be taken of the *pauper* by any counsel or attorney for the dispatch of business, whilst it depends in court, and he continues *in formâ pauperis*: nor shall any contract or agreement be made for any recompense or reward afterwards. And if any person offending herein shall be discovered unto the court, he shall undergo the displeasure of the court, and such farther punishment as the court shall think fit to inflict: and if any *pauper* offend herein, he shall be *dispaupered*, and never again be admitted in the same suit *in formâ pauperis*.

Ord. Chan.
152.

Praet. Reg.
267.

But although the clerks take no fees, strictly so called, of a *pauper*, yet they may make him pay for the labour of writing, which is after the rate of 2d. *per* sheet.

Ibid.

And if it be made appear to the court, that any *pauper* has sold or contracted for the benefit of his suit, or any part thereof, while the same is depending, such cause shall be thenceforth wholly dismissed, and never again retained.

Formerly

Formerly no process of contempt at a *pauper's* suit was to be sent to be sealed, until signed by the six clerk, who was to take care it should not be vexatious or needless: but this is now altogether disused. But the order of admission is usually produced in the office, where the *pauper* has occasion to pass.

And as a party may be admitted *in formâ pauperis* at any time during the suit, so he may be *dispaupered* at any time, upon its being made appear to the court that he is of such ability, that he ought not to sue *in formâ pauperis*. And in a case of this nature, where it was shewed to the court that a *pauper* was in possession, and received the rents of the lands in question, the court ordered him to be *dispaupered*; though the defendant had a verdict at law, and might thereupon take a writ of possession, &c. Pract. Reg. 268.

Both plaintiff and defendant may be admitted *in formâ pauperis* in the same cause: but this has been complained of as an abuse; for that it tends much to the disquiet of the court, and encourages the parties to be vexatious. Yet where it is a matter of contest, and the matter seems dubious, the court will admit both plaintiff and defendant to sue and defend *in formâ pauperis*.

And if a cause goes against a *pauper*, he shall not pay costs to the defendant; but he may be punished personally, as the court shall think fit: yet such punishment is very seldom inflicted.

Plaintiff a *pauper* had a decree for the duty and costs; the Master taxed costs as usual for persons not *paupers*. On motion, the court ordered plaintiff and solicitor to make oath before

2 Eq. Cas.
Abr. 633.
Prec. in
Chan. 219.

before the Master of what they had paid, or were to pay, and that to be allowed, but no further.

A person, by getting himself admitted a *pauper*, cannot discharge himself of costs he was liable to precedent to his admission: so where it was moved to amend a bill, by leaving out some of the defendants; and it was stated, that since the filing of the bill, the plaintiff had been admitted to sue *in formâ pauperis*; and therefore, that if the bill was dismissed against the defendants, it would be without costs; an objection was made to the amendment, as the defendants would be out of court, and could not at the hearing apply for their costs; and a case was cited to prove that parties shall not be protected by an order to sue *in formâ pauperis* from the costs of proceedings previous to the order; and the

Mosely, 68.

Lord Chancellor refused to make the rule, otherwise than *on payment of costs*, as *paupers* ought not to be permitted to harass persons by making them parties, without being liable to pay costs.

2 Brown's
Chan. Rep.
273.

The plaintiff was afterwards *dispaupered*, the order for shewing *in formâ pauperis* being irregular, as being founded on the affidavit of a *third person, not of the plaintiff himself*, that she was not worth 5l.

C H A P. III.

Of Ideots and Lunatics.—Under which head will be considered separately—What Persons are esteemed such, so as to come within the Protection of the Law—How they are to be found such; and herein of the Proceedings under a Commission of Lunacy—Who hath an Interest in, or Jurisdiction over them; and herein of appointing Committees, and the Power and Duty of such Committees—How they are to sue and defend in this Court.

And first,

What persons are esteemed Ideots or Lunatics.

AN ideot, or natural fool, is one that hath no understanding from his nativity, and therefore is by law presumed never likely to attain any. A man is not an ideot if he hath F. N. B. any glimmering of reason, so that he can tell ^{233.} his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an ideot; he being supposed Co. Litt. incapable of any understanding, as wanting all ^{42.} those senses which furnish the human mind Fiera, l. 6. ^{c. 42.} with ideas.

A lunatic, or *non compos mentis*, is one who hath had understanding, but by diseases, grief, or other accident, hath lost the use of his reason.

son. A lunatic is indeed properly one who hath lucid intervals, sometimes employing his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir *Edward Coke* says is the most legal name,) are comprized not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being *born* so; or such, in short, as are judged by the court of Chancery incapable of conducting their own affairs.

1 Inst. 241.

Secondly,

How Ideots and Lunatics are to be found such.

EVERY person of the age of discretion is, in consideration of law, presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil, as criminal cases.

By the old common law, there is a writ *de ideotâ inquirendo*, to inquire whether a man be an ideot or not, which must be tried by a jury of twelve men; and if they find him *purus ideotâ*, the profits of his lands, and the custody of his person, may be granted by the king to some subject, who has interest enough to obtain them. This is an ancient branch of the king's revenue, and hath been long considered as a hardship upon private families; and so long ago as in the 8 *Jac. 1.* it was under the consideration of parliament, to vest this custody in the relations of the lunatic, and to settle an equivalent on the crown in lieu of

Tot. b. 232.

it; it being then proposed to share the same fate with the slavery of the feudal tenures, which has been since abolished. But few instances can be given of the oppressive execution of it, since it seldom happens that a jury finds a man an ideot *a nativitate*, but only *non compos mentis*, from some particular time, which has an operation very different in point of law.

4 Inst. 203.
Com. Journ.
1610.

The method of proving a person *non compos* is very similar to that of proving him an ideot. The Lord Chancellor, to whom, by special authority from the king, the custody of ideots and lunatics is intrusted, upon petition or information, grants a commission in nature of the writ *de ideotâ inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be this committee of his person; because it is his interest that the party should die. But, it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be intitled to enjoy. The heir is ² P. Will, generally made the manager or committee of ^{638.}

To procure this commission, the first step to be taken is, to have the affidavit of two or more

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more persons prepared, in which the state and condition of the lunatic is to be set forth, and some few instances of his declarations and actions also stated, to shew their opinion and belief of his being a lunatic, and incapable of governing himself.

The affidavit may be in this form :

“ *John Holland of, &c. and Francis Perkins of &c. severally make oath and say, that they these deponents, for the space of one year last past, have known and been well acquainted, and frequently discoursed with Oliver Templeman of, &c. ; and these deponents further severally say, that within the space of ——— last past they have, by frequently observing the behaviour, words and actions of the said Oliver Templeman, looked upon him to be a person deprived of his reason and understanding in a very great degree ; and this deponent John Holland saith, That, &c. [set forth some of the most notorious facts, incoherencies, and irrational discourses,]* and these deponents further severally say, that they believe the said *Oliver Templeman* is no ways capable of governing himself or his estate.

*John Holland,
Francis Perkins.*

Sworn the — day of
1789, at the public
office, before

A petition to the Lord Chancellor is next to be prepared, the form of which may be as follows.

The

Court of Chancery.

741

The Petition.

" To the Right Honourable the Lord High
Chancellor of Great Britain.

" The humble Petition of *Abraham Temple-*
man,

" Sheweth,

" That *Oliver Templeman* of, &c. [*name the lunatic with his addition*] your petitioner's son, (or what other relation he is) now is, and for the space of — months last past and upwards, has been so far deprived of his reason and understanding, that he is rendered altogether unfit and unable to govern himself, or to manage his affairs, as by the affidavit annexed appears.

" Your petitioner therefore most humbly prays your Lordship will be pleased, that a commission in the nature of a writ *de lunatico inquirendo*, may issue out of this honourable court, to inquire of the lunacy of the said *Oliver Templeman*, directed to such persons as your Lordship shall think fit.

" And your petitioner shall ever pray," &c.

This petition, with the above affidavit annexed, is to be carried to, and lodged with the Lord Chancellor's secretary of lunatics, who will get the same answered.

And if the commission is to be executed in the country, you must give in commissioners names to the secretary, which list must contain

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the

*If the Chan-
cellor is not
satisfied with
the affidavit,
he may order
the petition to
be set down
for hearing
of counsel.*

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the names of five persons, two or three of them barristers, and the other attorneys, or such as the Lord Chancellor will approve of, which the secretary will inform you of; and upon entering a *caveat* with the secretary (for which you pay 5 s.) with proper allegations, the person against whom the commission is prayed will have leave given to him to present a list as well as the party applying. But if the lunatic lives in or near *London*, there are commissioners for that purpose appointed. When you have procured the petition answered, you carry it to the clerk of the custodies, and he will thereupon make out the commission, for which you pay him 3 l. 7 s. 6 d.

The form of the Commission.

“ George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To his beloved Charles Cotton, Francis Woodhouse, Joseph Jekyll, Augustine Greenland, and Anthony Pye, Esquires, greeting. Know ye, that we have assigned three or more of you to inquire, by the oath of good and lawful men of our county of *Middlesex*, as well within liberties as without, by whom the truth of the matter may be better known, whether Oliver Templeman, late of *Watling-street*, *London*, stationer, but now of the parish of *St. John*, *Hackney*, in the said county of *Middlesex*, is a lunatic, or enjoys lucid intervals, so that he is not sufficient for the government of himself, his manors, messuages, lands, tenements, goods and chattels;

tels; and if so, from what time, after what manner, and how, and if the said *Oliver Templeman*, being in the same condition, hath alienated any lands or tenements or not; and if so, what lands, and what tenements, to what person or persons, where, when, and after what manner, and how, and what lands and tenements, goods and chattels, as yet remain to him; and of what person or persons, as well the lands and tenements so alienated, as the lands and tenements to him retained, are held, and by what service, and after what manner, and how, and how much they are worth by the year in all issues, and who is his nearer heir, &c. &c. &c. and of what age; and therefore we command you, three or more of you, that at certain days and places which you shall for this purpose appoint, ye diligently make inquisition in the premises, and the same distinctly and plainly make to us, into our Chancery, under your seals of three or more of you, and the seals of those persons by whom it shall be made, without delay ye send, and these our letters patent; for we command, by the tenor of these presents, our sheriff of our county of *Middlesex* aforesaid, that at certain days and places which you shall make known to him, he cause to come before ye, three or more ye, so many, and such good and lawful men of his bailiwick, as well within liberties as without, by whom the truth of the matter in the premises may be better known and inquired into. In testimony whereof we have caused these our letters to be made patent. Witness ourself, at *Westminster*, the 15th day of *December*, in the 29th year of our reign."

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The commission being obtained, a place is appointed for the execution of the same, which, according to the Lord Chancellor's order, ought to be near the place of the supposed lunatic's residence; and then a summons or precept, which is in the nature of a *venire facias*, (directed to the sheriff of the county in which the commission is to be executed) is prepared, as follows:

The precept to the sheriff.

“ By virtue of a commission, in nature of a writ *de lunatico inquirendo*, under the great seal of Great Britain, bearing date at *Westminster*, &c. (*the date of the commission*) to us, whose names are here underwritten, and others in the same commission named, directed, to inquire whether *Oliver Templeman* of, &c. be a lunatic or not; these are therefore to will and require you to cause to come and appear before us twenty-four honest and lawful men of the city and liberty of *Westminster*, on the 26th day of *December* next, by ten of the clock in the forenoon of the same day, at the house of *George Albone*, situate in a certain street or place there, called *Piccadilly*, and commonly called or known by the name or sign of the Gun Tavern; then and there upon their oaths to inquire of the lunacy of the said *Oliver Templeman*, and of all such other matters and things as shall be given them in charge by virtue of the said commission; and therefore fail not at your peril. Given under our hands and seals the 17th day of *December* in the 29th year of the reign of our Sovereign Lord *George* the Third, by the
grace

grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. and in the year of our Lord 1789.

"To the Sheriff of the county of Middlesex, or his deputy."

This you carry (having put three seals thereto) with the commission to such three of the commissioners as you shall think proper, who will sign and seal it, for which you pay them one guinea each, and then lodge it at the sheriff's office; and the jury ought to be of the town or neighbourhood where the lunatic lives.

If the lunatic is in custody of any person who you are apprehensive will not voluntarily produce him (for he must be present and examined by the jury *viva voce*) then you make out a warrant for that purpose, as follows:

A warrant to produce the lunatic.

"By virtue, &c. (as before to) These are to will and require you to produce before us the said *Oliver Templeman*, at the execution of the said commission on, &c. (as in the summons) there to be examined touching the matters aforesaid, and you are to give him notice of it accordingly; as also to any other person or persons who are guardians of him, or trustees of his estate, that they may appear in his defence, if they shall think fit. Given our hands and seals, &c.

"To Mr. Jonas Harvey, or such other person or persons as now have the said Oliver Templeman in their custody or power."

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The commissioners sign and seal this warrant without any fee, and then you are to make copies thereof, and serve it upon such persons as you believe, or can make appear, have the custody of his person, or the direction and management of him or his estate at the time of service, shewing the original.

But in order to make the person who has the custody of the supposed lunatic liable to a contempt, and to enforce the producing of the person of the supposed lunatic to the commissioners and jury, it is best to apply to the Lord Chancellor for an order for that purpose.

Also if you apprehend the witnesses, or any of them, will not voluntarily attend, you make out a *subpœna* as follows :

The subpœna for witnesses.

“ By virtue, &c. (*as before to*) These are to will and require you, that you personally be and appear before us on, &c. (*as in the summons*) then and there upon your oath to testify the truth according to your knowledge, touching the lunacy of the said *Oliver Templeman*, and of all such matters and things as shall be demanded of you by virtue of the said commission. Hereof fail not at your peril. Given under our hands and seals, &c.

“ *To Richard Kenrick,
Peter Dale,*” &c.

This the commissioners also sign and seal *gratis*, and then you make copies thereof, and serve

serve it upon the witnesses, shewing them the original.

Note, That the precept, warrant, and *subpoena*, need not be upon stamped paper or parchment.

Upon the day of executing the commission, you must take care to have your witnesses ready, and the lunatic attending the commissioners; and the jury being all sworn, then you proceed to take the inquisition thus, *viz.*

In the first place, you must read over the commission, and then the commissioners will proceed to examine the witnesses, and afterwards the lunatic (if necessary); but the lunatic may insist on being examined, the commissioners and jury only being present.

Having gone through with the proofs, the chairman, or first commissioner, sums up the evidence and facts to the jury, who thereupon give their verdict as in other cases, and after the jury have given in their verdict, you fill up the blanks of the inquisition, (which, for expedition sake, is generally prepared beforehand with large blanks) according to the inquest, and then you read it over to them for their consent, which is to be signed both by the commissioners and the jury.

Note, Counsel may attend at the execution of these commissions.

The form of an inquisition.

“ *Middl. ff.* * An inquisition taken at the house of *George Albone*, situate in a certain

* A commission of lunacy must not be *specialy* returned; he must be found *mad*, or *not mad*. S. C. Chan. 47.

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street or place there called *Piccadilly*, and commonly called or known by the name or sign of the *Gun Tavern*, in the county aforesaid, the 26th day of *December* in the 29th year of the reign of our Sovereign Lord *George* the Third, by the grace of God, of *Great Britain, France, and Ireland*, King, Defender of the Faith, &c. and in the year of our Lord 1789, before *Charles Cotton, Anthony Pye, and Joseph Jekyll*, Esqrs. and ———, Gentleman, his said Majesty's commissioners, by virtue of a commission in nature of a writ *de lunatico inquirendo* under the great seal of *Great Britain*, bearing date at *Westminster* the 15th day of *December* last past, to them the said commissioners and others in the said commission named directed, to inquire (amongst other things) of the lunacy of *Oliver Templeman* of, &c. upon the oaths of *Isaac Preston, &c.* (*insert the names of all the jurors*) good, honest and lawful men of the said county of *Middlesex*, who being sworn and charged upon their oaths, say, That the said *Oliver Templeman* is at the time of taking this inquisition a lunatic (or of an unsound mind), and doth not enjoy lucid intervals (*as the jury find him*), so that he is not capable of the government of himself, his manors, messuages, lands, tenements, goods and chattels, and that he hath been in the same state of lunacy for the space of — last past, and upwards; but how or by what means the said *Oliver Templeman* so became lunatic the jurors aforesaid know not, unless by the visitation of God: and the same jurors upon their oaths further say, That they do find that the said *Oliver Templeman*, at the time of taking this inquisition, is seized of or intitled to one
messuage,

messuage, &c. (*the premises he is found seised of or intituled unto*) which descended to him as, &c.; and also that the said *Oliver Templeman* hath not alienated any of his lands or tenements during his lunacy aforesaid, to the knowledge of the same jurors. And the same jurors upon their oaths further say, That the said *Oliver Templeman* is, at the time of taking this inquisition, also possessed of or intituled unto (*set forth what personal estate*). And lastly, the same jurors do find, that *Jerome Templeman* of, &c. is brother and nearer heir to the said *Oliver Templeman*, and that the said *Jerome Templeman*, at the time of taking this inquisition, is of the age of ——— or thereabouts. In testimony whereof, as well the said commissioners, as the jurors aforesaid, have to this inquisition set their hands and seals the day and year first above written."

This inquisition is generally writ sheet-wise on unstamped paper, and is signed by the commissioners and all the jurors, &c. on which you pay to the commissioners, if in town, two guineas each, and to the jury half a guinea a-piece, to the sheriff two guineas, and to the summoning bailiff one guinea; but in the country it is usual to give more, and pay the sheriff the same as you do the commissioners.

Then you must prepare an ingrossment of the inquisition upon parchment, stamped with a treble sixpenny stamp, and annex it to the commission, which you return, on the back, writing these words, "*The execution of this commission appears by the inquisition hereunto annexed,*" which the commissioners sign, and then fixing labels and seals to the bottom of the inquisition,

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inquisition, three for the commissioners on the left-hand side, and likewise one for every one of the jurors, you carry it with the commission annexed, and the inquisition (which was signed by the commissioners and jury at the time of taking) to the commissioners, who will sign the return of the commission, and sign and seal the inquisition, for which you pay them one guinea each; *but there is no occasion for the jury to sign this ingrossment.*

When you have thus completed your inquisition, you must carry it to the petty-bag office to be filed, where they make you an office copy of the commission and inquisition upon double sixpenny stamped paper, which you make use of on all occasions, either in court or otherwise; for which you pay the following fees, *viz.* filing 2 s. 6 d. copying 8 d. *per* sheet, and signing the copy 2 s.

Upon this, some near relation or friend petitions for the custody of the lunatic's person, and in the same petition the person who will be intitled to his real or personal estate at his death, prays the care and management of the lunatic's estate and effects.

But the custody of the person is seldom or never granted to those who are to take his estate immediately upon his death, but generally to the nearest relation, who hath no right to his estate.

The Petition for the custody of the person, and the care and management of the Lunatic's estate.

“ In the matter of *Oliver Templeman*, a lunatic.

“ To the Right Honourable the Lord High Chancellor of *Great Britain*.

“ The humble Petition of *Bryan Templeman* of, &c. and *Jerome Templeman* of, &c.

“ Sheweth,

“ That pursuant to your Lordship's order of the 1st day of *December* last, made upon the petition of your petitioner *Bryan Templeman*, a commission in nature of the writ *de lunatico inquirendo* was issued out and directed to certain commissioners therein named, to inquire of the lunacy of *Oliver Templeman* of, &c. who is *second son* of your petitioner *Bryan Templeman*, and *first brother* of your petitioner *Jerome Templeman* (*as the case is*).

“ That the said commission hath since been duly executed on the 26th day of *December* last past, before the major part of the commissioners in the said commission named; and thereby it is found, that the said *Oliver Templeman* was then a lunatic, and not capable of the government of himself, his manors, messuages, lands, tenements, goods and chattels, and so had been for — last past; and it is by the said inquisition further found, that the

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said *Oliver Templeman* was seised of or intitled unto a considerable real and personal estate, and that your petitioner *Jerome Templeman* is brother and nearer heir to the said *Oliver Templeman*, the lunatic, and at the time of taking the said inquisition was of the age of — years.

“ That your petitioners being desirous that the person and estate of the said lunatic may be duly taken care of, in such manner as is necessary and usual in cases of this nature ;

“ Your petitioners therefore most humbly pray your Lordship, that the care and custody of the person of the said lunatic may be granted to your petitioner *Bryan Templeman*, and that the care and management of his estate may be granted unto your petitioner *Jerome Templeman*, he giving such security as is usual in the like cases.

“ And your petitioners shall ever pray,” &c.

This petition you lodge with the secretary of the lunatics, and if his Lordship answers it in the affirmative, the committee of the person may demand the lunatic in whose custody soever he be ; and the committee of the estate having entered into a recognizance with sufficient sureties before a Master, the clerk of the custodies will procure the commitment of his estate under the great seal.

But note, That the person who is found a lunatic, or any person on his behalf, may nevertheless enter a *caveat* with the secretary against

against the petition for the commitment of his person and estate, and may then petition the Chancellor, that the commission may be superseded upon his being inspected and examined in open court; which his Lordship will answer accordingly, and appoint a day for that purpose, against which time the lunatic should procure affidavits of two or three of the most eminent physicians, with regard to his *sanity* and *capacity* of being able to take care of himself, and manage his estate; for the court will not, without pretty strong evidence, supersede the commission after he is found a lunatic by the jury.

The commissioners and jury have a right to inspect the person of the lunatic, and examine him before them; but they do not always cause him to be brought before them, unless a considerable doubt was raised on the evidence as to his sanity; but they have a right to require it: and as it has been determined in this court, that if the commissioners think it proper, he ought to be produced before them, *without the prior order of this court*; so if the persons in whose custody the lunatic is, have refused to produce him, the court has not only made them pay costs, but has also committed the party so refusing.

2 Vef. 405.
1 P. Will.
701.

Where there is any misbehaviour in the execution of the commission, the same may be examined into, and if the court see cause, they may quash it, and grant a new commission.

3 Atk. 6, 7.

So though a man be found an idiot by inquisition taken before the sheriff, and by their examination, &c. and that be returned into the Chancery, yet he who is so found idiot may in person, or by his friends, come into the Chancery before the Chancellor, &c. and shew the matter, and pray that he may be examined

ed

Fitz. Nat.
Brev. under
title *De*
ideota in-
quirendo et
examinando,
532.

ed before the Chancellor, whether he be ideot or not; and if upon examination he be found no ideot, then in the inquisition found before the sheriff, and also the examination which the sheriff hath made and returned thereupon, shall be of no effect, but the same office shall be taken as void without any other traverse: and,

The same rule holds as to an inquisition of lunacy, though the consequences are different; and where the lunacy of a person is in question, the court will make a provisional order as to his effects, till the point of lunacy is determined.

Ibid.

It is a common method to inquire by inspection after an inquisition returned, and there have been many cases of that sort; but if, upon inspection, the Chancellor is at all doubtful, there seems to be another method pointed out by which that doubt may be determined, and that is, by statute 2 *Ed. 6. c. 8. s. 6.* which enacts, "That if any person be or shall be untruly found a lunatic, &c. every person and persons grieved or to be grieved by any office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices found so." By this statute a party found an ideot or lunatic has liberty to traverse the inquisition, as may any other person * having title to the land; and

* Skinner, 178. Vide Stone's case in Tremain's Pleas of the Crown, 653. a precedent of a traverse; and for the doctrine of traversing an inquisition, vide 4 Co. the case of the Commonalty of the Sadlers, and 8 Co. 168. Paris Stoughter's case. Sir T. Jones's Rep. 198. Shower 199. S. C. Skinner, 45. S. C.

therefore

therefore it is said, that by the statute 18 Hen. 6. c. 7. there ought to be a month's time between the return of the inquisition, and the grant of the custody and land, in order for the parties to come in and tender such traverse: a person against whom a commission of lunacy issued, on the different appearance he made, upon a second inspection, was allowed to traverse the inquisition, and the grant of the custody suspended till further order; and it has been determined that not only the lunatic, but the heir of the lunatic, is bound upon the traverse of the inquisition: so where the alienee and the lunatic traverse, if he is found a lunatic at the time of alienation, the alienee is bound: but on an application to the court, to traverse the *second* inquisition, which found that at the time of taking it the lunatic was of unsound mind, &c. the court said, that if, after two inquisitions, the petitioner should be allowed to traverse, the proceedings in lunacy would be spun out to a very great length and infinite expences, and would be a very heavy burden upon the subject, and therefore the petition was dismissed: so where a person kept a commission of lunacy by him for several years without putting it into execution, the same was held to be a contempt of the court, and the commission was discharged with costs.

3 Atk. 7, 8.

Ibid. 317.
Beverley's
case, 4 Co.
123. b.

Ibid. 313.

3 Atk. 185.

2 Atk.

A commission of lunacy was ordered against a person who resided abroad, to be executed in the county where his mansion-house lay; and it was said by the court, that no mischief can follow from granting such a commission; for if the jury are satisfied without the inspection, they will find so; if not, they will not make a return, or will return that it does not appear

Ambler's
Rep. 109.
Southcote's
case.

appear to them that he is an ideot or lunatic : if he has notice of it, he may oppose the commission ; or if he has not, yet any body may apply for him to traverse or supersede the commission ; in either of those cases he must appear to be examined *coram rege in concilio*, which words have been considered to mean, this court.

Though a jury find, that one is incapable of managing his affairs, yet such a finding is not sufficient, but they must expressly find him to be of unsound mind.

2 Ves. 409.

Thirdly,

Who hath an Interest in, and Jurisdiction over them ; and herein of appointing Committees, and the Power and Duty of such Committees.

Fleta, lib. 1.
c. 11-10.

F. N. B.
232.

4 Rep. 126.

THE custody of *ideots*, and of their lands, was formerly vested in the lord of the fee ; and therefore still by special custom, in some manors the lord shall have the ordering of ideot and lunatic copyholders ; but by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king as the general conservator of his people, in order to prevent the ideot from wasting his estate, and reducing himself and his heirs to poverty and distress. This fiscal prerogative of the king is declared in parliament by statute 17 *Ed. 2. c. 9.* which directs (in affirmance of the common law) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessities ;

cessaries; and after the death of such ideots, he shall render the estate to his heirs, in order to prevent such ideots from aliening their lands, and their heirs from being disinherited*.

To lunatics also, as well as to ideots, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute of 17 *Ed. 2. c. 10.* that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them, for their use when they come to their right mind; and the king shall take nothing to his own use; and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary; and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

This distinction, established by this statute, between the king's interest in the lands of an ideot and lunatic, is laid down and admitted in all the books which treat of this matter†;

* My Lord Coke, in his second Institute, 14. is of opinion, that by the common law the king had no prerogative in the custody of an ideot's lands, but that the same belonged to the lords of whom the lands were holden, and that the same was given to the king by some act of parliament after the making of *Magna Charta*, and before the statute of *de prerogativa regis*, 17 *Ed. 2. c. 9.*; but in 4 *Co. Beverley's* case, he says, that this prerogative was by the common law, and that the statute *de prerogativa regis* is only declarative thereof.

† *Bro. Ideot*, 4, 5. *Dyer*, 25. *Moor*, 4, pl. 12. *And.* 23. 4 *Co.* 127. *Co. Litt.* 247.

3 Mod 43,
44. Skin.
5. 177. pl. 7.
2 Show. 171.
pl. 164.

and on this foundation it hath been resolved, that the king may grant the custody of an ideot * and his lands to a person, his heirs and executors, and that he had the same interest in such a one as he had in his ward by the common law: but since it very seldom happens that a jury find a man an ideot *a nativitate*, but only *non compos mentis*, from some particular period, few instances can be given of the oppressive exertion of this branch of the king's prerogative.

2 Chan. Caf.
239.

But though a lunatic is by commission to be under the care of the public, and such committee is to be appointed for him by the Lord Chancellor, whose acts are subject to the control and correction of the court of Chancery; yet such a one, whether so appointed, or whether he of his own accord take upon him the care and management of the estate of a lunatic, is but in nature of a bailiff or trustee for him, and accountable to him, his executors or administrators; and as the committees of a lunatic have no interest but an estate during pleasure, it hath been ruled, that they cannot make leases, nor in any way incumber the lunatic's estate without a special order from the court of Chancery, where the profits are not sufficient to maintain the lunatic †.

The king's grant of the lunatic's estate *without account*, is void; but the king, or Lord Chancellor, may allow such a yearly mainte-

* But the king cannot grant the custody of the body and lands of a lunatic to one, to take the profits to his own use. Moor, 4. pl. 12. adjudged.

† 1 Vern. 262. Foster v. Merchant. So the committee of a lunatic cannot make a lease of the lunatic's lands at law. 2 Will. 130.

nance to a lunatic, as amounts to the yearly value of the lunatic's estates *.

The care and management of all affairs relating to idiots and lunatics is so peculiarly under the direction and authority of the court of Chancery, that all abuses in relation to them, as taking them out of the custody of their committees, marrying them, &c. are punishable as contempts to that court.

Rec. in
Chan. 2031

The court allowed the profits of the lunatic's estate to the committee for the maintenance of his person; the lunatic dies, his administrator brings a bill for an account of these profits; the committee pleads this order of court of the allowance of the profits for the lunatic's maintenance; the plea was ordered to stand for an answer, but the court declared ^{3 P. Will.} they would not relieve without gross fraud.

No appeal lies from an order of the Lord Chancellor touching lunatics, to the House of Lords, but only to the king in council †.

The

* ^{3 P. Will. 104.} Note, The power of the Lord Chancellor over idiots and lunatics is by sign manual of the king, countersigned by the two secretaries of state, empowering him to take care of them in the right of the crown, and to make grants of their estate.

† The following extract has been taken from the Lords' Journal:

"*Die Martii*, 14th February 1726. The House (according to order) proceeded to take into consideration the petition and appeal of William Pitt, Esq; and Samuel Pitt, merchants, complaining of two orders made by the Lord Chancellor the 23d of December, and 25th of January last, granting the custody of the person of Samuel Pitt, a lunatic, the appellant's uncle, as in the appeal is mentioned, and praying that the said orders may be reversed. And the said appeal being read by the clerk, notice was taken to the House, that the custody of idiots and lunatics was in the power of the king, who might delegate the same to such person as he should think fit. Whereupon the Lord Chancellor produced a paper writing, under his Majesty's royal sign manual, intrusting his Lordship with the care and commitment of the custody of idiots and lunatics, and of their persons and estates; and the same being read by the clerk, it was moved, that the before-mentioned appeal of the said William Pitt and Samuel Pitt might be received; and, after long debate, and reading the statute of the 17 of King Edward 2. *de prerogativa regis* of idiots,

By the Lord
Parker
ex parte
Kingsmill,
Michael-
mas 1720.

Caf. in Eq.
Temp. Tal.
c. 143.

The custody of a lunatic may be granted to a feme covert, though she be not *sui juris*, but under the power of her husband: so the custody of the lunatic's estate was granted to baron and feme, she being next of kin; the wife dies, the husband's right to the custody of the lunatic's estate is determined, *it being a joint grant, and a mere authority without any interest.*

Petition by A, committee of the lunatic (who had 400l. a year allowed him out of the lunatic's estate for maintaining the lunatic,) to be further allowed a sum of money, reported by the Master, for his trouble in taking care of the lunatic's estates, which are large, and lie dispersed in *England* and in *Ireland*. The next of kin, who are intitled to the personal estate of the lunatic after his death, consented to his having such allowance, so far as by law they could give such consent. But

Lord *Hardwicke*, Chancellor, refused to make any order; for the rule of the court is otherwise. Trustees or committees of lunatics appointed by the court never have any allowance made them for their trouble; they are supposed to have a regard for the lunatic and his family, and are often his relations, or at least friends, and undertake the care upon charitable motives; and therefore as it never had been done, he would not make a precedent now for himself and successors; nor is the con-

c. 9 & 10. the question being put, whether this appeal should be received? it was resolved in the negative.

Ashley Cowper, *Cler. Parliamentor.*"

In consequence of the above resolution, an appeal was brought before the king in council, where, after some debate touching the jurisdiction, the matter of the appeal was heard and determined, May 13. 1728.—
3 P. Will, 109. in note.

sent

sent of the next of kin (so far as they are by law capable of consenting) ground sufficient to obtain the allowance; for it is the interest of the lunatic which the court regards; and tho' they are next of kin at present, yet the lunatic may outlive them, and the personal estate, after his death, go into other hands*.

Petition by the solicitor for A (who was a lunatic) setting forth, that he had expended great sums of money in prosecuting suits in this court, and at law, on behalf of the lunatic; and praying that he may be at liberty to enter up judgment, with a stay of execution against the lunatic for such monies, that thereby he may have a lien on his real estates.

Lord Chancellor: An action cannot be maintained against a lunatic, but it must be against the person that employed the solicitor, who is the committee. If a solicitor prosecutes to a decree, he has a lien on the estate recovered in the hands of the person recovering for his bills; but if the client should die, the solicitor has no such lien on the estate in the hands of the heir at law, unless it should be necessary to have the suit revived, and then the lien will revive too. In the present case, the solicitor has a lien on the lunatic's estate; and I will assist the solicitor as far as I can, therefore declare he stands in the place of the committee, and has a lien upon the lunatic's estate†.

The Lord Chancellor may make an order in lunatic's affairs *after the death of the luna-*

* Ambler's Rep. 78. But under circumstances, the court will increase the allowance for maintenance, which will answer the allowance for trouble.

† Ambler's Rep. 102. But quære, If he had such decree; and the counsel for the solicitor doubted of it.

Ambl. Rep.
706.
Vide also
ex parte
Roberts,
3 Atk. 5.
308.

tic; for after the custody of the lunatic is granted, by virtue of the king's sign manual, the great seal acts in matters relative to the lunatic, not under the sign manual, but by virtue of its general power as keeper of the king's conscience: the court makes many orders, and enforces them by attachment; which orders and manner of enforcing them are not warranted by the sign manual, but by the general power of the court.

Fourthly,

How they are to sue and defend in this Court.

IT has been already observed, that the care and commitment of the custody of the persons and estates of ideots and lunatics are the prerogative of the crown; and are always intrusted to the person holding the great seal, by the royal sign manual; and by virtue of this authority, upon an inquisition finding any person an ideot or a lunatic, grants of the custody of the person and estate of the ideot or lunatic are made to such persons as the Lord Chancellor, or Lord Keeper, or Lords Commissioners for the custody of the great seal for the time being, think proper; and therefore ideots and lunatics sue by the committees of their estates; and they defend also by their committees, who are by order of court appointed guardians for that purpose as a matter of course: and if it happens that an ideot or lunatic has no committee, or the committee has an interest opposite to that of the person whose property is intrusted to his care, an order may be obtained for appointing another person as guardian

guardian for the purpose of defending a suit. So if a person who is in the condition of an idiot or lunatic, though not found such by inquisition, is made a defendant, the court, upon proper information of his incapacity, will direct a guardian to be appointed.

Sometimes informations have been exhibited by the Attorney General, on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown; and if in a bill filed by the committee, or in an information exhibited by the Attorney General, the lunatic be not named a party, that is commonly a good cause of demurrer; but if the bill be brought in nature of an injunction, to be relieved against some act done during his lunacy, it is not necessary that he should be made a party, for that were to stultify himself.

Chan. Caf.
112. 153.

Ibid. 113.

One, through great age, being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian, in regard the demand in question was but small; but had the value been considerable, the regular way had been to have taken out a commission of lunacy, and have gotten a committee assigned.

Per Lord
Talbot,
2 P. Will.
111.

Persons being idiots, lunatics, or *non compos mentis*, who are seised or possessed of estates in fee, or for life or years, in trust, or by way of mortgage, are enabled to make conveyances or assignments of such estates, in such manner as the Lord Chancellor shall direct, on hearing of the persons for whom such idiots or lunatics shall be seised in trust*; so lunatics are also enabled by statute † to surrender

* Vid. stat.
4 Geo. 2.
c. 10.
† 29 Geo. 2.
c. 31.

leases in order to renew the same under the direction of a court of equity.

A distinction is to be made between acts done by ideots and lunatics *in pais*, and in a court of record; that as those acts solemnly acknowledged in a court of record, as fines and recoveries, and the uses declared on them, they are good, and can neither be avoided by themselves nor their representatives; for it is to be presumed, that had they been under these disabilities, the judges would not have admitted them to make those acknowledgments.

Co. Litt.
247.

Therefore, if a person *non compos mentis* acknowledges a fine, it shall stand against him and his heirs; for though the judges ought not to admit of a fine from one labouring under that disability, yet when it is once received, it shall never be reversed; because, the record and judgment of the court being the highest evidence that can be received, the law presumes the conuzor at that time capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

4 Co. 124.
2 Inst. 483.
Bro. title
Fines, 75.
Co. Litt.
247.

As to acts done by them *in pais*, they are distinguished into void and voidable, although as to themselves they are regularly unavoidable; because no man is allowed to disable himself, for the insecurity that may arise in contracts from counterfeit madness and folly; besides, if the excuse were real, it would be repugnant that the party should know or remember what he did; but their heirs and executors may avoid such acts *in pais*, by pleading the disability.

C H A P. IV.

Of Guardians and Prochein Amys.

THERE are several species of guardians ; the first are guardians by *nature*, viz. the father and (in some cases) the mother of the child. For, if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits ; ^{Co. Litt. 88.} and with regard to daughters, it seems, by construction of the statute 4 & 5 *Pb. and Mar. c. 8* *. that the father might by deed or will assign a guardian to any woman child under the age of sixteen ; and if none be so assigned, the mother shall, in this case, be guardian. ^{3 Rep. 39.} This guardianship continues till the infant attains the age of twenty-one ; it yields as to

* The direct object of this statute was to prevent the taking away or marrying maidens under sixteen against the consent of their parents ; but the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and mother, or the person appointed by the former. It is observable on this statute, that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under sixteen generally. According to the strict language of our law, only an *heir apparent* can be the subject of guardianship by nature ; which restriction is so true, that it hath ever been doubted, whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is in effect rather of the presumptive kind. Therefore when guardianship by *nature* is extended to children *in general*, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term, but must be understood to have reference to some rule independent of the common law. Thus when in Chancery the father and mother are styled the *natural guardians* of all their children, we should suppose those who express themselves so generally, to refer to that sort of guardianship which the order and course of nature, as far as we are able to collect it by the light of reason, seem to point out, and to mean, that it is a good rule to regulate the guardianship by, where the positive law is silent, and it is in the discretion of the Lord Chancellor to settle the guardianship. Har. Co. Litt. 88, note 12.

2. men.

the

the custody of the person to guardianship in socage, where the title to both guardianships concur in the same individuals; but guardianship in socage ending at fourteen, it is presumed, that after that age the father or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of twenty-one. Guardianship by *nurture* only occurs where the infant is without any other guardian, and none can have it except father or mother; it extends no further than the government and custody of the infant's person, and determines at fourteen, in the case both of males and females.

Moor, 733.
3 Rep. 38.

Guardianship by *socage* springs wholly out of tenure; therefore the title to it cannot arise, unless the infant is seised of lands, or other hereditaments lying in tenure holden by socage. The title to this guardianship is in such of the infant's next of blood as cannot have by descent the socage estate, in respect of which the guardianship arises, by descent, without any distinction between the *whole* and *half* blood. This guardianship being wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation, forfeiture, or succession; and consequently if the guardian in socage becomes incapable or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. This guardianship, like that of tenure, continues only till the infant is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. And this he may do, unless one be appointed by the father, by virtue of the statute
of

of 12 Car. 2. c. 24. which considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship in *chivalry* (which lasted till the age of twenty-one), enacts, That any father under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of twenty-one years. These are called guardians by *statute*, or testamentary guardians.

There are also special guardians by *custom* of *London*, and other places; but they are particular exceptions, and do not fall under the general law.

A guardian then is he that hath the custody and education of such a person as is not of sufficient discretion to guide himself and his estate; and the duty and office of guardians consist in taking care of the infant's person, his education, and estate; for they can do nothing but for the profit and benefit of the infant, nor intermeddle with any thing but of what they may tender an account.

Guardians may discharge incumbrances affecting the infant's estate: so where a question was, whether when an estate descends to an infant subject to incumbrances, the guardian must or may (without the direction of a court of equity) apply the profits to discharge the incumbrances, or the interest of them? or whether they should not be accounted personal estate, and so the administrator of the infant intitled to them, if the infant die during his minority?

The

The court held, that the guardian might, without the direction of the court, pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge upon the land; but not any other real incumbrance; but they are not compellable to apply the profits of the estate of the infant heir to pay off bond debts; neither can they with the rents and profits purchase lands, so as to prevent the money from going in a course of administration.

Prec. in
Chan. 737.

2 Vern. 606.

1 Vern. 403.

435. S. C.

2 Vern. 480.

The Lord Chancellor * is, by right derived from the crown, the general and supreme guardian of all infants, as well as ideots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns; and orders on petitions, *without bill*, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship: thus in the case of Lord *Tenham* and *Barret*, there was no bill depending in this court, but only a *petition*, desiring that Lady *Tenham*, the mother, being a papist, might not have the guardianship of the infant, and determined on petition against the mother; upon which an appeal was brought to the House of Lords, before whom it was *not objected*, that this court could not, on a petition only, determine the right of guardianship; and on the appeal, the Lords also determined the right against the mother. Also,

18th March
1718.

In the case of a testamentary guardian †, such guardian having a plain legal right upon

* But see Harg. Co. Litt. 88. note (16.) where the reader will find the origin of the Lord Chancellor's jurisdiction over infants considered very much at large by that learned editor.

† Note, The *mother's* appointment of a guardian to her son by will is void; the statute confining the power of appointing a testamentary guardian to the father only. 3 Atk. 519.

the words of the will, and the whole case arising thereon, there can be no need of a bill in equity, no proofs on either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition, without a bill.

2 P. Will.
120.

Guardians are but trustees, and the statute by enabling the father to devise the guardianship of his children, did no more than empower the father by will to choose a different person from him or her that would have been guardian in socage, a different person than what the law would have appointed, and to continue that guardianship to a different time than the guardianship in socage would have continued, *viz.* until twenty-one, instead of fourteen. But still a guardian appointed according to the statute, had no more power than a guardian in socage; and as the court could interpose where there was a guardian in socage, so might it also do in the case of a guardian by statute, both being equally trustees: so this court will, and has interposed even in the case of a father, as where the child had an estate, and the father, who was insolvent and of an ill character, would take the profits, there the court had appointed a receiver: so if any wrong steps are taken by a guardian, which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being likely to suffer by the conduct of a guardian, or if a guardian chose to make use of methods that might turn to the prejudice of the infant, the court will interpose, and order the contrary; and this is grounded upon the general power and jurisdiction which it

Kyffin v.
Kyffin,
cited in
1 P. Will.
705.

The Practice of the

it had over all trusts, and a guardianship is most plainly a trust.

Davey v.
Lord Hold-
erness,
Trin. 1725.
by Lord
King.
1 P. Will.
707.

One devised the guardianship of his child to his wife and A; but if his wife should marry again, then the wife and A to fix upon another guardian; the wife did marry again, but would not agree with A to choose another guardian; resolved, that it devolved upon the court of Chancery to appoint a guardian: so where a guardian is recommended by will to act with the advice of J S, and J S is attainted, this superior tendency devolves upon the court of Chancery.

A, who had a bishop's lease to her and her heirs during three lives, devises the same to her daughter an infant, and directs the guardian and trustees to make purchases for the infant's benefit. The guardian, upon the decease of one of the three lives, took a new lease for three lives: the infant dies; the question was, whether this new lease should go to the old uses? to the heirs *ex parte maternâ*, as the first lease would have done, or whether to the heirs of the infant *ex parte paternâ*?

Lord Chancellor: This is a descendible freehold, and if nothing had been altered, would have gone to the heirs *ex parte maternâ*; but the new lease is to be considered as a new acquisition, and to vest in the infant as a purchaser; how then will this go, considered as a new purchase? If the infant had lived till full age, and then had surrendered the old lease, and taken a new one, this certainly would have gone to the heirs *ex parte paternâ*: so if all the lives had died, and the guardian had renewed the lease, it would likewise have gone to the heirs on the part of the father: and
this

this is not like the case of an infant's personal estate turned into real; for the reason of that's being still considered as personal estate; is, because of the different ages at which the infant might dispose of his person, and his real estate, and not out of favour to any one representative more than another. And

1 Atk. 480.

It being objected, that this was an act done by a guardian only during the minority, and ought not to prejudice any one taking by representation, it being an act merely voluntary, and not out of necessity; the court said,

That if this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a court of equity to be relieved against it; but here was a just and reasonable occasion for what the guardian has done; for he was directed by the mother to make purchases for the benefit of the infant. Here one life being dead, surrendering the old, and taking a new lease, was the most beneficial purchase for the infant that could be, and therefore ought to have the same consequence as if done by the infant herself at full age*.

It has been already shewn, that by the statute of 12 Car. 2. c. 24. a father has a right to dispose of the guardianship of his child until he attains twenty-one years of age; and this appointment will be binding, unless some misbehaviour be shewn in the guardian; in which case it being a matter of

* 1 Atk. 481. So where a feme purchases a church-lease to her and her heirs for three lives, and dies, leaving an infant daughter, two of the lives die, the infant's guardian renews the lease; this held to be a new acquisition, and shall go to the heirs on the part of the father. Prec. in Chan. 319.

trust,

trust, this court has a superintendency over it; and the right of a testamentary guardian takes place of a guardianship by nature; for by the express words of the act of parliament, the guardian by will takes place of all other guardians; and his authority by that law, is a continuation of the paternal authority: so if a man devises the guardianship of his child to three persons, and without saying, "and to the survivors or survivor of them," it has been determined that the survivor shall have it; for where several guardians are appointed by a will, each of them seems to be a complete guardian; and it would be very mischievous, and of very ill effect, if, where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do any thing, which would be the consequence if a guardianship devised to several should be taken to be one joint naked authority: a guardian has an authority coupled with an interest, and may bring a writ of ravishment of ward on the infant's being taken from him; and though the damages recovered shall by the statute go towards the benefit of the ward, yet the declaration must lay it *ad damnum* of the guardian of the plaintiff.

2 P. Will.
108.

One of the guardians of an infant girl, of about nine years old, takes her from a boarding-school, and marries her to his own son, who has no estate; the court ordered the guardian to produce the girl in court, and then committed her to the other guardian, directing, at the same time, an information to be brought against the guardian who married the ward to her disparagement: but this was held

to

to be no contempt; the ward not being under the immediate care of the court.

2 P. Will.
561.

A guardian will not be appointed after marriage; neither will the court determine a guardianship, or discharge any order made for a guardian, because of a marriage*; and this court, without discharging guardians from the trust reposed in them, will make orders for the regulation of their conduct, if they conduct themselves in a manner not satisfactory to the court.

1 Ves. 169.

The marrying an infant ward of the court of Chancery is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court; for all acts of the court, as the commitment of a wardship, and in a cause depending, is to be taken notice of by every one at his peril.

3 P. Will.
116, 117.

A petition, that a guardian may be assigned (unless to carry on a suit, or protect an interest), must be pursuant to the statute.

1 Brown's
Chan. Reps
556.

By a *prochein amy*, or next friend, is usually meant that person by whom an infant, a lunatic, or feme covert, sues in this court; and where a suit is by a *prochein amy*, who is not sufficient to answer costs, the court will order another to be named who is able and sufficient: outlawry, or excommunication, in a guardian or *prochein amy*, cannot be pleaded or alleged in disability where an infant sues or defends by him.

And note, the guardianship of an infant is not assignable over to another.

If a guardian takes a bond for arrears of rent, he thereby makes it his own debt, and

* Vide 1 Ves. 97. where it is said, guardianship of daughters determines by marriage, *secus* of sons.

² Chan. Rep.
97.

shall be charged with it; but he shall in his account be allowed all reasonable expences disbursed by him in the discharge of his trust; and if he is robbed of the rents and profits of the land without his default or negligence, he shall be discharged thereof upon his account.

¹ Inst. 89.

A guardian by common law may be removed by this court, or compelled to give security, if there appears any danger of their abusing either the infant's person or estate; and this court sometimes, though rarely, removes a testamentary guardian; but if he behaves not to the satisfaction of the court, orders for the regulation of his conduct are frequently made upon him.

¹ Vef. 160.

CHAP. V.

Of Trustees.

THE office and duty of trustees having been already considered pretty much at large in the introductory part of this work, it will be necessary to make but very few additional observations in this place upon that subject.

MSS. Caf.
in Chan.
Trist. 7 Ann.

Whoever has the possession of goods or lands, either hath the absolute property or estate in them by a sufficient title; or, so far as that is wanting, is considered as a trustee for the owner. And he that takes upon him a trust, takes it for the benefit of the person for whom he is trusted, and not to take any advantage to himself.

And by Sir *John Trevor*, Master of the Rolls, the heir of a mortgagee shall hold only in trust for the executors.

Infants,

Infants, being trustees only, by statute 7 *Ann.* c. 19. may be obliged to convey as the court shall direct, without a day.

Regularly no act of the trustee shall prejudice the *cestui que trust*; but the trustee shall make good the trust. And the law seems to be the same of the act of God; for if the trustee of a legacy dies before the legacy is paid, this shall not prejudice the legatee.

A trustee may in some cases sue in his own name, but ordinarily *cestui que trust* must be made a party.

What he is compellable to do by suit, he may do without suit; as to join with *cestui que trust* in tail in a feoffment; for there are trustees merely to preserve his estate.

Regularly he is to have nothing for his own labour and pains: yet if he employs a skilful bailiff, and gives him 20l. *per annum*, that must be allowed, for he is not bound to be his bailiff. And he shall not pay, but have costs, except he be guilty of some breach of trust, or some wilful misdemeanour. Nor will the court ever charge him with imaginary values, but only as bailiff, though very supine negligence might indeed, in some cases, charge a trustee with more than he had received; but the proof thereof must be very strong.

If a trustee is robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the sum is only proved by his own oath, for he was to keep it but as his own.

Where there are more than one, there is a difference between trustees and executors. For trustees have all equal power, interest, and authority, and cannot act separately, as executors

Toth. 156.
2 Chan. Caf.
138.

1 Vern. 144.

2 Chan. Caf.

1 Vern. 28.

2 Vern. 137.

2 Chan. Caf.

112.

2 Vern. 548.

The Practice of the

may, but must join both in conveyance and receipts; for one cannot sell without the other, or desire to receive more of the consideration money, or to be more a trustee than his partner. So that it would be contrary to justice to charge them with each other's receipts, except in case of necessity, where they so join in receipt, as not to be distinguished what has been received by one, and what by the other.

Cro. Car.

312.

2 Vern. 515.

1 Salk. 318.

But if two executors join in the sale of the goods, &c. of the testator, they shall be both chargeable, though one of them only received the money, for there was no necessity for their joining.

2 Vern. 570.

Trustees shall not be examined as witnesses one against another, except in some special cases, and that by order of the court.

A trustee examined as a witness was afterwards thought necessary by the court to be, and was made a defendant. Upon hearing, his depositions were not allowed to be read, though he should pay no costs, nor should gain or lose by the decree (be it as it would), because the decree must be against him, and his depositions are to affirm his own act.

On a devise of lands in trust for payment of debts, the trustee himself purchases part: and

The Lord Chancellor said, he would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence: nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent.

1 Ves. 9.

Per Lord

Hardwicke.

It

It has often been determined, that in a devise to trustees it is not material, the word *heirs* should be necessary to carry the fee at law; for if the purposes of the trust cannot be satisfied without having a fee, courts of law will so construe it.

1 Ves. 491.
3 Burr.
1686.

On a bill to execute a trust, the first person intitled to the inheritance is a necessary party if in being.

2 Ves. 492.

It is a principle laid down in this court, and not to be departed from, that in limitations of a trust, either of real or personal estate, to be determined in this court, the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator or author of the trust appears plainly to the contrary; but if the interest does not plainly appear to contradict and over-rule the legal construction of the limitation, it was never laid down, that the legal construction should be over-ruled by any thing but the plain intent*.

It is an established rule, that a trustee, executor, or administrator, shall have no allowance for his care and trouble; the reason of which seems to be, that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value; besides the great difficulty there might be in settling and adjusting the *quantum* of such allowance; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

3 P. Will.
251.

* 2 Ves. 655. Vide also Brown's Chan. Rep. 223, where the same doctrine is held, and ruled by Lord Chancellor Thurlow.

Thus where an executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands; but the court said, all bargains of this sort ought to be discouraged, as tending to eat up the trust; wherefore the plaintiff's demand was disallowed*.

In the case of trustees, though there are not negative words in a deed, *that they shall not be liable for the acts of one another*, yet this court will not make them liable for more than each has received; but if trustees will bind themselves to be liable for the acts of each other, this court will not relieve them: so where a bill was brought to replace money raised by sale of the plaintiff's property in the funds, by the trustee, the only question was, whether A, one of the trustees in the deed, but who had never executed it, or formally accepted the trust, was liable? B, the other trustee, sold the stock, but A knew of it, and concealed it from the plaintiff; and the Lord Chancellor held A equally liable with B.

1 Brown's
Chan. Rep.
69.
Ibid. 400.
430. 653.

* 3 P. Will. 251. in note (A.) And it seems to be owing to this jealousy, which a court of equity entertains of an executor or trustee, that if they compound debts or mortgages, and buy them in for less than is due thereon, they shall not take the benefit of it themselves, but other creditors and legatees shall have the advantage of it, and for want of them, the benefit shall go to the party who is entitled to the surplus; whereas, if one who acts for himself, and is not in the circumstances of an executor or trustee, buys in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due thereon. Ibid. and see Balk. 155.

Where

Where a trustee is merely a trustee, and there is any act to be done by him, it is very commendable in him to be cautious; but where he has a private interest of his own separate and independent from the trust, and obliges *estui que trust* to come into this court, merely to hear the point relating to his private interest determined at the expence of the trust; this is such a vexatious behaviour in him, that he will be decreed to pay the whole costs of the suit.

2 Atk. 48.

A breach of trust is considered but as a simple contract debt, and can only fall upon the personal estate of the trustee; and the particular circumstances of a case ought not to vary the rule: and a trust is, where there is such a confidence between parties, that no action will lie, but is a case merely for the consideration of a court of equity.

Ibid. 119.

Ibid. 612.

Trustees for supporting contingent remainders, joining to destroy them, are guilty of a breach of trust; and no diversity, whether the settlement be voluntary or for a valuable consideration, or by will only; and in such case, if the persons claiming under the breach of trust have notice of it, they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration, and without notice, the purchaser will hold the lands discharged, and the trustees must buy and settle other lands to the same uses.

Ibid. 678.
681.

C H A P. VI.

Of Feme Coverts.

FEME coverts are married women. And husband and wife must both join in suit for things merely in action belonging to the wife. But sometimes the wife by her *prochein amy*, or next friend, sues her husband in this court; as where she sues him for performance of a marriage settlement, or the like: and sometimes she petitions against him, or sues him here from *alimony*; as where he turns her away, or she goes away upon ill usage: also a feme covert hath been allowed to sue here in her own name, when her husband was beyond sea: so in a case where a husband released the wife's debt. A feme covert, who has a separate maintenance, may sue alone. So may a wife whose husband is banished by act of parliament; and may act in every thing as a feme sole. If the wife answers, and the husband stands out all process of contempt, the bill can be taken *pro confesso* against the husband only. So where a wife, by combination, refused to join with her husband in a plea. A feme covert must answer alone, if the husband is not amenable. So an attachment was granted against a wife, the husband not being amenable. Though the wife's answer differs from the husband's, yet it shall not prejudice him, for she can be no witness against him.

1 Chan. Caf.
41.

Ibid. 35.

2 Ve n. 104.

2 Chan. Caf.
173.

2 Chan. Caf.
296.

2 Ve n. 613.

M ch. 1711,
B. 1 w.
Commissary
Hidr.

2 Vern. 79.

1 Chan. Caf.
39.

Where a wife is defendant, you cannot regularly serve the wife with process to answer, without serving the husband also, though the matter

matter in question concerns the wife only. But though ordinarily the wife must not answer alone, yet where plate, &c. had for many years before been deposited with her, and the bill was brought against the husband and her, and he being in *Ireland* could not be brought to answer, she was ordered to answer alone. And frequently the wife is put to answer alone, when the husband is beyond sea: but there is usually obtained an order for the wife to put in and swear her answer separate from her husband. So where she lives separate from her husband, she is often ordered to answer alone. ^{1 Chan. Rep. 62.} But if she answer alone without leave of the court, the answer will be suppressed upon motion.

In some cases the wife has been committed without her husband. But ordinarily, if the wife be in contempt for any matter in this ^{Cary's Rep. 92.} court, the husband is also liable to process of contempt, and commitment, as the case requires.

Upon petition at the Rolls before Sir *Joseph Jekyll*; the bill was against the husband and wife, upon special matter shewn (by affidavit) of collusion between the plaintiff and the defendant's wife; she not appearing to answer the bill, his Honour directed that the process of contempt must be against husband and wife, but that it should not be executed against the husband. ^{Grifwood v. Higson, Trin. vac. 1738.}

No decree can be had against a feme covert for her inheritance, if the husband will not appear, &c. for her answer is no answer without his. ^{1 Chan. Caf. 39. 173.}

But a feme covert, though an infant, being heir of a mortgagee or trustee, may be ordered

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Com. Rep.
615.

ed to levy a fine, and make such conveyances as mortgagees and trustees of full age.

Cary's Rep.
27.

The woman and her husband agreeing to part upon difference, and he giving her a sum of money for her livelihood, which was put into a friend's hand for her, she was allowed to sue alone for this without her husband.

1 Chan. Caf.
41.

Of things merely in action, belonging to the wife, as a bond, legacy, &c. she ought to join in suit; *aliter* of a rent running in the wife's right after marriage; and if the husband alone should see the bond, and be nonsuited or dismissed, that will not conclude the case; but if he die before judgment or decree, the wife cannot revive the suit.

MSS. Cafes
in Chan.
Morgell's
case, Pasch.
8 Ann.

If a wife has a fortune payable *in futuro*, to be raised at so much *per annum* out of a term, and the husband dies insolvent before the commencement of the term, her fortune is not liable to pay her husband's debts, unless he makes her some settlement.

Ibid.
Harrison v.
Constantine.

Also where a husband covenants to settle certain lands upon his wife, and he afterwards disposes of the lands, and dies, the court will order an account of his assets, and a purchase of lands of equal value to be settled on her.

Ibid.
East v.
Coggs.

But where a citizen of *London* agrees to leave his wife so much at his death, and dies intestate, she cannot both have her fortune and her distributive share according to the custom too, but must make her election.

If a feme covert has any particular portion, or sum of money by settlement, decreed her, which became due either before or after the marriage, the court will not order it to be paid to the husband, unless he makes a suitable settlement upon her, or she appears in person

person in court, and consents thereto: as in Lady *Windsor's* case, where, by act of parliament, a particular sum was given her in lieu of the lands settled upon her.

Where the fortune of a feme sole is deposited in court, and she marries even without consent of the court, and first the husband dies, and then the wife, without issue, yet it shall go to the representatives of the husband, and not of the wife; for the money being in court, it was always in his possession, subject only to the equity of the wife and the children, for a reasonable provision for them, who, failing, the money belongs to his representatives.

MSS. Caf.
in Chanc.
Temp.
Cowp. 1715.
Parker v.
Windham.

But in a case where the wife's portion was paid into the hands of the Master, and the husband died indebted, the court decreed that this portion was not assets of the husband; for as at law, where judgment is recovered by baron and feme, the judgment survives to the wife, and the benefit thereof, *Et equitas sequitur legem*, though it seems to have been determined otherwise in this court, where the wife is a lunatic, for there it has been looked upon as vested in the husband.

Fitzgibb.
148.
Nightingale
v. Lockman
& ux.

Note, This seems to be, where the wife survives the husband.

CHAP. VII.

Of Heirs,

AN heir is one that succeeds, by descent and right of blood, to lands, tenements, and hereditaments, being an estate of inheritance,

And

And heirs, as observed before, are some of those persons who are favoured in equity. They shall not be disinherited by doubtful or ambiguous words, or by implication. And where they are disinherited, they shall be favoured in this court.

3 Chan. Caf.
131.

1 Vern. 480.

2 Chan. Caf.

4.

Ibid. 134.

* 1 Vern.

336.

1 Salk. 115.

2 Vern. 178.

Eq. Caf.

Abr. 264—

276.

Max. of Eq.

3. pl. 7.

pl. 5. 51.

pl. 1. 55.

pl. 3. 68.

pl. 5. 22.

8 Mod.

pl. 32. 90.

122.

Anon. Com.

Rep. 345.

A voluntary devisee shall have no assistance against an heir here, but will be left to help himself at law as he can. And though a trustee misemploy the money raised on a trust estate, yet it shall not be to the prejudice of the heir*.

And if a settlement is made of lands to be sold in trust for several purposes, the residue is given to B and his heirs, reserving only 200l. to be paid to such person as the donor should by writing under his hand direct; who died without such direction; the 200l. will go to the heir of him who made the settlement, and not to B, or his heirs.

If will is made, and estate of inheritance devised from heir at law; devisee commonly exhibits bill against him†, in order to perpetuate testimony of it, by proving due execution thereof; this is done by examining witnesses thereto, *in perpetuam rei memoriam*‡; for which purpose will in question must be set forth *verbatim* in bill, which heir at law having answered, plaintiff proceeds to issue, as in other

† Where heir at law is made defendant, and insists on his title, he shall have costs, though the cause is determined against him; but if he be plaintiff, and miscarries on a groundless suit, he shall pay costs.—

2 P. Will. Rep. 373.

‡ Though court takes examinations to perpetuate testimony of will, yet it will not try validity thereof, but if time comes collaterally in question, court usually directs issue at law to try the same: therefore such bill must not pray any relief, order, or decree for establishing will: see 2 Vern. 366.: if plaintiff does, heir at law may demur, and insist on his right to contest will at law; whereupon demurrer will be allowed, and an order must be obtained to amend bill. See Vern. 354. 441.

cases, and then examines witnesses to will *, or proves their hands, if they are dead, for the purpose of perpetuating their testimony; the will (if the witnesses are examined in *London*) must be left at the examiner's office, for inspection by them, and for their being examined thereto; which done, and publication passed †, the cause is at an end.

The heir at law, if he examines no witnesses touching the validity of the will, may give notice of motion, for plaintiff to pay him his costs, to be taxed by Master, which court usually grants: but the heir at law is at liberty to cross examine all the witnesses to the will ‡.

C H A P. VIII.

Of Executors and Administrators.

AN executor is a person intrusted by law with the testator's *personal* estate; and therefore, if there does *not* appear to be some *insolvency* in the executor, or some *gross* design to waste the testator's effects, or to go into *another* kingdom, equity will not take the security out of his hands. 2 Eq. Cas. Abr. 420. c. 1.

An executor, from his name, is but a *trustee*, he being to execute his testator's will; and therefore called an executor: and this is

* If heir at law examines witnesses to prove insanity of testator, at time of making will, or that he was imposed upon, circumvented, or improperly importuned, to make same, or that it was not duly executed, according to stat. 29 Car. 2. c. 3. he shall not have costs, but bear his own. See 2 P. Will. Rep. 285.

† Rules or an order being first obtained for publication.

‡ Though heir at law cross examines plaintiff's witnesses, and refuses to release his right, he shall have costs.

P. W. II. Rep.
349. 375.

the *only* reason why the legatee may bring a bill against the executor for his legacy.

An administrator is one that hath the goods of a man dying intestate committed to his charge by the ordinary.

And executors and administrators differ in little else than in the manner of their constitution, their office and duty being almost exactly the same.

Toth. 74.

Executors may not charge or be charged in equity farther than the law doth charge them. And here they may sue one another. So one (or both) of them may sue an executor of an executor, if he hath gotten the estate into his hands, or for a *devastavit* he hath committed. And one executor alone, without the rest, may be sued here; but he shall be charged for no

1 Chan. Caf.

more than he hath. An executor temporary proves the will, afterwards his executorship determines: held, the subsequent executor may sue here without farther probate of the will.

Ibid. 265.

MSS. Caf.
in Chan.
Darwell v.
Burrows,
Mich.
3 Ann.

If executors sever in their receipts and disbursements, in such case they shall only be answerable *pro tanto*; but if they act jointly, each of them shall answer the whole, if one becometh *insolvent*.

Cary's Rep.
30.

If a suit be here against two executors, and one of them appears and answers, the suit shall not ordinarily be prosecuted against him to a hearing till the other has answered, and be brought to a hearing likewise; for they are but one person.

Toth. 74.

Two executors are plaintiffs, one of them is excommunicate, the other may be severed, and the defendant shall answer him.

Barnard.
Rep. 320.

A person may be allowed to bring a bill as administrator, before administration actually taken out.

How far an administrator shall be charged with interest.

Barnard.
Rep. 390.

Though an administrator ought to have costs given him to the time of the decree for the account, in what cases the subsequent costs ought to be reserved.

Ibid.

When a decree is made against an administrator where interest shall be reserved.

Ibid.

Where an obligor is made executor, it is no extinguishment of the debt.

MSS. Caf.
in Chan.

Executors indiscreetly placing out money are liable to answer it. Or where testator dies indebted on bond, and assets sufficient come to the hands of his executor who detains them, and lets the interest go on upon the bond, this prejudice shall be turned upon himself.

Bodily v.
Hill, Trin.
7 Ann.
Ibid.

Where a testator leaves no legacy to his executor, then the executor is residuary legatee, if no devise of the residue; for it doth not appear that he hath any thing else for his trouble.

Ibid. Anon.
Hil.
7 Ann.

A particular legacy, either specific or pecuniary, given to executors that are strangers in blood, excludes them from the surplus: but an executor, if next of kin to the testator, is not excluded from the surplus; for whoever is considered as a trustee of the surplus, must be so as to the whole surplus, and the next of kin cannot be for the whole; as next of kin, he is intitled to a distributive share. And if there be more executors than one, whether strangers or not, a legacy to one only, shall not exclude him, nor any of the rest, of the surplus, for they are joint, and each had power over the whole.

Foster v.
Mount,
MSS. Caf.
in Chan.
Trin.
7 Ann. &
2 Vent. 349.
359.

Executors placing out money in purchases are liable to answer, if the *cestui que use* disprove

Hunt v.
Berkley,
Eq. Caf.
Abr. 243.
pl. 4.

Rep. Eq. 10.
Gilb. Chan.

341.
MSS. Caf.
in Chan.
Terry v.
Terry.

2 P. Will,
163.

prove of it when he comes of age ; or if they lend money on personal securities, it is at their own peril.

A by will gives an annuity out of his personal estate. If the executor has *misbehaved* himself, the court will order part of the personal estate to be set aside to secure this annuity.

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